Supreme Court of the United States

OCTOBER TERM, 1920.

No. 172.

EDWARD RUTLEDGE TIMBER COMPANY AND NORTHERN PACIFIC RAILWAY COMPANY, APPELLANTS,

vs.

ALRA G. FARRELL, APPELLEE.

BRIEF FOR APPELLEE.

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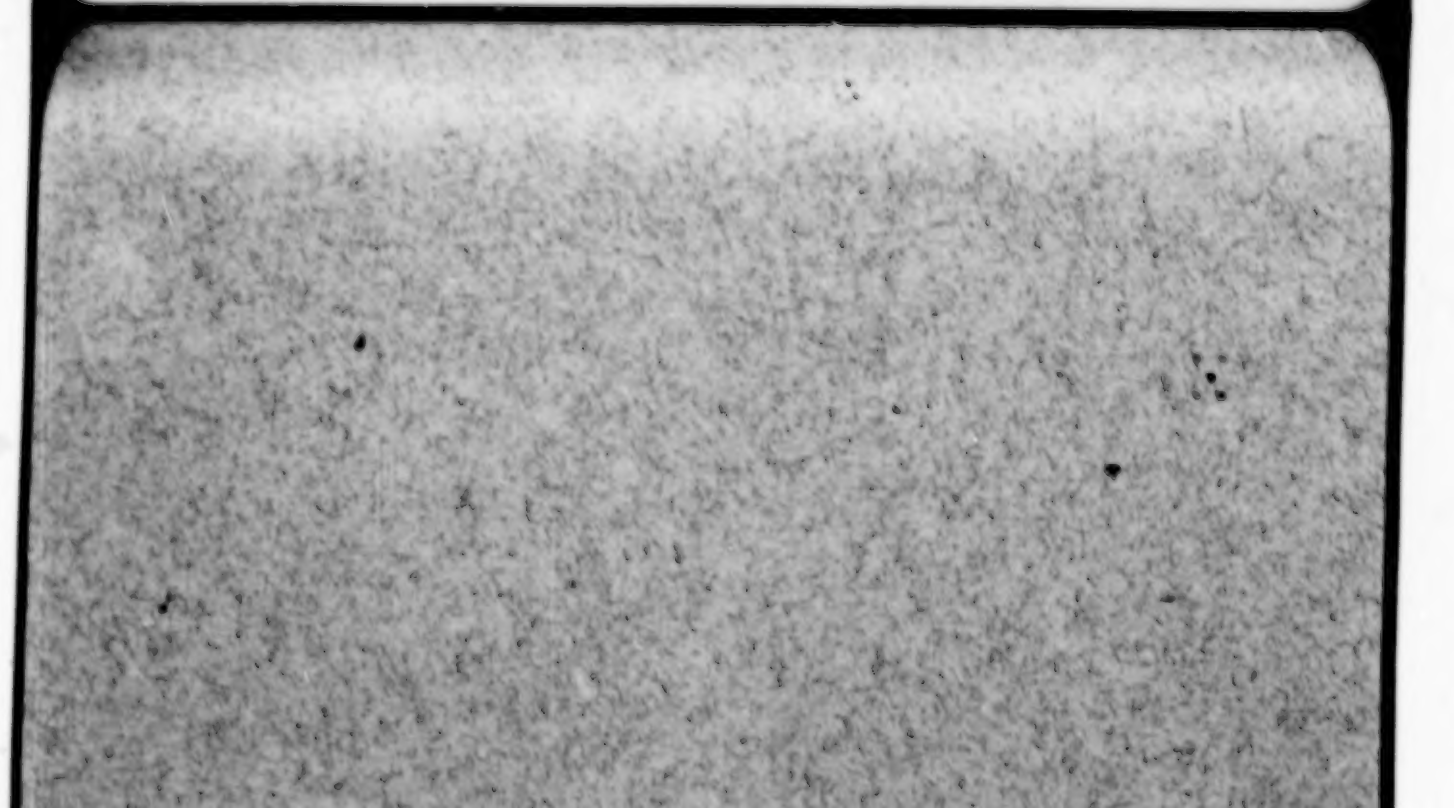

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The Issues.

This is an action commenced in the United States District Court for the District of Idaho by Belden M. Delaney against the Edward Rutledge Timber Company, transferree of the Northern Pacific Railway Company, to require the defendants to hold the land patented to the company as trustee for him, for the reason that it should have been patented to him under his homestead claim, which gave him a prior and superior right to the land. That title should not have been given to the company for the additional reasons, first, the description of the land which was unsurveyed, in its selection list in terms

of a future survey was not a compliance with the specific requirements of the Act of March 2, 1899, under which it was made which requires such a description as will designate the land with a reasonable degree of certainty, and that the land was not subject to its selection because of the application of the State of Idaho for survey under Act of August 18, 1894, made prior to the company selection. The death of Delaney having been suggested, the above-named plaintiff was substituted.

The District Court decided against Mrs. Farrell, who appealed to the Circuit Court of Appeals, which reversed the decision of the District Court (Fed. Rep., 758, p. 161) appeal by the defendants below, brings the case before this court.

We have been served with brief filed in this court by appellants in support of their assignment of errors.

STATEMENT OF FACTS.

Legislative History of the Act of March 2, 1899.

The Act of March 2, 1899 (30 Stat., 993) originated with the Northern Pacific Railroad Company, was introduced in both Houses of Congress, and urged by its friends, and was a movement on its part to exchange with the United States a part of its grant which at that time was almost, if not quite worthless, and obtain from them a new grant, not confined to its indemnity limits, as are the losses in all other railroad grants, but of 444,222 acres of the choicest remaining non-mineral lands, equal to

19½ townships—more than half the size of the State of Rhode Island—"lying within any State into or through which the railroad of the Northern Pacific Railroad Company runs." No other such grant was ever made by Congress and we are quite certain no other one giving such advantages will ever again be made. It is not in accordance with the record to say "the act was passed in furtherance of a design of the Government to obtain title to certain lands in the Mt. Rainier National Park, then owned by the defendant Railway Company," as claimed. On the contrary, as above stated, it was urged by the friends of the company in Congress, and *no official of the Government ever recommended it*, as is usual when such bills are introduced in Congress. However, the act was passed, conveyance made to the United States and the company is entitled to whatever falls within a strict construction of the act, but it has no equities.

Provisions of the Act of March 2, 1899.

The sections applying to this case are 3 and 4, which are as follows:

> "Sec. 3. That upon execution and filing with the Secretary of the Interior, by the Northern Pacific Railroad Company, of proper deed releasing and conveying to the United States the lands in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said Company, whether surveyed or unsurveyed, which lie opposite said com-

pany's constructed road, said company is hereby authorized to select an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual Government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States; Provided, that any settlers on lands in said national park may relinquish their rights thereto and take other public lands in lieu thereof, to the same extent and under the same limitations and conditions as are provided by law for forest reserves and national parks.

Sec. 4. That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed in due form of law, and deliver to said company, a patent of the United States conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the Company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company describing such tract according to such survey;

and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity."

Statute Unique.

As we have seen, this statute is unique in at least four particulars:

1. It requires that where land is unsurveyed the company in its selection *must describe the land with a reasonable degree of certainty.*
2. To be subject to selection it must be not only non-mineral in fact, but must have been *classified as non-mineral at the time of actual Government survey.*
3. Within three months after the plats of survey are filed in the local office a *new list* must be filed describing the tracts according to such survey.
4. If original selection shall not conform with the lines of the official survey the company shall be permitted to describe it anew so as to secure conformity.

No other statute, requiring the same construction, has ever been passed by Congress for the disposal of the public lands, and none ever gave the grantee such special privileges. It gave an unlimited commission to the company to roam over and select out before survey the most valuable lands, including timber lands, as in this township, in all the great public land States, worth many millions of dollars and many times the worthless land which

the Government had granted it, and which it gave in exchange. It follows it is only simple justice to strictly construe the act against the grantee. Wisconsin Central Ry. Co. vs. U. S., 164 U. S., 190 (Sutherland on Statutory Construction, sections 454 and 458; Am. and Eng. Enc. of L., Vol. 23, pp. 402 and 407); Slidell vs. Ember, 111 U. S., 412; Dubuque and Pacific Railway vs. Litchfield, 64 U. S. (23 How.), 166; Newton vs. Commissioners, 160 U. S., 548. In the case of the Northwestern Fertilizer Co. vs. Hyde Park, 97 U. S., 659, the rule of construction is thus stated:

> "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded, but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claimant. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this country."

In the case of Idaho vs. Northern Pac. Ry. Co., 42 L. D., 118, the Department having under consideration the Act of August 18, 1894, authorizing the State to make application for survey with a view to selection of the lands in lieu of losses, held:

> "This was a statute granting a special privilege as against others seeking to appropriate public lands. It was held by Judge (later Justice) Lurton, in Campbellsville Lumber Company vs. Hubberd, 112 Fed.,

718, concurred in by Judge (now Justice) Day, that: 'An attentive consideration of the principle of statutory construction here involved leads us to conclude that when a statute gives a *new and unusual remedy, and directs how the right to the remedy is to be acquired or enjoyed, and how it is to be enforced, the act should be strictly construed;* and the *validity* of all acts done under authority of such an act will *depend upon a compliance with its terms.* In respect to such acts the steps pointed out for the acquisition, preservation and enforcement of the remedies provided should be *construed as mandatory,* rather than optional.' "

The Departmental decisions follow this settled rule of construction.

In construing this grant, on the application of the company to be allowed to select lands in lieu of glaciers located within the boundaries of the Mt. Rainier land conveyed to the United States (40 L. D., 141), held:

"These glacial areas are rivers of ice and do not have such fixity and are not susceptible of such occupation or use. There was no undertaking by the United States that the quantity of land granted should equal any fixed number of acres and the company was entitled thereunder only to such lands as may be found to be in fact covered by the grant. *Sioux City & St. Paul Ry. Co.,* 159 U. S., 149.

"The Department is convinced that it was not the intention of Congress that such areas should be surveyed or disposed of as a part of the public lands of the United States, and that the grant to the Northern Pacific Railway Company did not convey the same.

If there be any doubt in the construction of the granting act in this respect it *must be resolved against the railroad company under the settled rule that such statutes are to be strictly construed against the grantee, Wis. Central Railroad* vs. *U. S.*, 164 U. S., 190."

The Statute a Private Act.

Notwithstanding its title, the Department, in the case of *Comstolk* vs. *N. P. Ry. Co.*, 34 L. D., 88, held the amending Act of June 6, 1900, confining lieu selections under the Act of June 4, 1897, to surveyed lands, did not apply to the Act of March 2, 1899, for the reason the latter is a private act. It was also held that the act repealing the Act of 1897 did not repeal that act for the same reason.

It is not a remedial statute as there were no "wrongs to right nor mischiefs to cure." It constitutes an offer to exchange unidentified public lands for lands given the Northern Pacific Railroad Company by the United States in the grant to the road.

The construction given the act by the Department in the case of the *State of Idaho* vs. *N. P. Ry. Co.*, 37 L. D., 135, at p. 138, is as follows: That "the act is contractual in character and terms. * * * In the opinion of the Department, every element of a contract is present in the Act of March 2, 1899, and the act is complete in itself."

This being the position of the Department, as expressed in that case and as taken by counsel in the argument in this case, let us consider the act in this light.

The Act an Option.

First, then, it will be conceded that the act gives the railroad company an option to convey its lands and accept in lieu thereof lands falling strictly within its terms. In the nature of the case the company could not have been compelled by the act to accept its provisions as it owned the land. It was under no obligation, either legal or moral, to convey any of its lands. Neither was it bound to take unsurveyed lands for lands conveyed. Counsel conceding the act is contractual, and on its face it is strictly an option only, let us see what rules of law apply to it.

In the case of *Carr* vs. *Duval et al.*, 14 Pet., 77, the Supreme Court quoting *Eleason* vs. *Henshaw*, 4 Wheat., 228, held:

> "An offer of a bargain by one person to another imposes no obligations upon the former, unless it is accepted by the latter, *according to the terms in which the offer is made.*"

In the case of *Minneapolis and St. L. Ry. Co.* vs. *Columbus Rolling Mill Co.*, 119 U. S., 149, it was held:

> "A proposal to accept, or an acceptance, upon *terms varying from those offered, is a rejection of the offer* and puts an end to the negotiations."

In Cyclopedia of Law and Procedure, Vol. 9, pp. 265 and 276, the rule is thus stated:

"The acceptance of an offer must be absolute and any conditions as to time, place, quantity, mode of acceptance or other matters which it may please him to insert in and make a part thereof and the acceptance to conclude the agreement must in every respect meet and correspond with the offer neither falling within or going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand."

"An acceptance, to be effectual, must be identical with the offer and unconditional" (p. 267).

In Am. and Eng. Enc. of Law, Vol. 3, p. 852, the rule is thus stated:

"The acceptance of an offer must be absolute and unqualified, for until there is such an acceptance, the negotiations of the parties amount to nothing more than proposals and counter-proposals.

"Acceptance must be unequivocal, unconditional and without variance from proposal." *Strange* vs. *Crawley*, 7 West. Rep. (Mo.), 106.

It follows, therefore, that construing the act as the company insists it must be construed, it can get no land that does not fall "unequivocally and unconditionally and without variance" from the precise terms of the offer. See also U. S. vs. N. P. Ry. Co., 170 Fed., 498, and N. P. Ry. Co. vs. U. S., 176 Fed., 706.

Have the Decisions of the Department in the Adjustment of This Grant Been Quite Fair to the Settlers?

The quotation, by the Circuit Court of Appeals, in its decision in this case, from the decision of this court, ren-

dered more than seventy years ago, in the case of Lytle vs. State of Arkansas, 9 How., 314, that to the national feeling towards the pioneer who is found in advance of our settlements, who encounters many hardships, and is generally poor, in favor of rewarding him for his enterprise, had been shown by the course of legislation for many years. And the case of Ard vs. Brandon, 156 U. S., 537, in which this court said:

> "The law deals tenderly with one who in good faith goes upon the public lands with a view of making a home thereon"

is most appropriate in this case.

The court, with equal propriety, might have quoted from the decision of this court, announced by Mr. Justice Brewer, in the case of the Northern Pacific Railway Company vs. Amacker, 175 U. S., 564, wherein it was said:

> "The contest in this case is between one claiming under a homestead entry and the company claiming under a grant in aid of the railroad. It was long ago said by this court that 'the policy of the federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements over that of any other person. * * *
>
> "There is no real hardship in enforcing this rule, for, if the individual seeking to maintain his home-

stead entry fails by reason of any defect he has no recourse on the Government for the fees he has paid or for any compensation for the time and labor he has expended, while, on the other hand, the general provision of the railroad land grant is to the effect that if the title to any tract within the place limits fails the company may reimburse itself by a selection within indemnity limits. It is not, therefore, strange that the rulings of the Land Department, as well as of the courts, have been uniformly favorable to the individual contesting with a railroad company the right to a particular tract of land."

It may be added that under all administrations the doctrine enunciated in these cases has been frequently quoted as its true guide in the decision of cases involving settler's claims. But, notwithstanding this, we assert, the record will show that, with a possible exception, no administration of the Department has been quite fair to the settlers in their conflicts with the company under this grant.

As corroboration of this assertion, attention is invited to the decision in the Hanson case, 38 L. D., 491 (of which the West case was a part, as he with nine others signed the petition upon which the decision was rendered), wherein after stating that when the motion was entertained the Department had grave doubts as to the sufficiency of a description such as we have in the case at bar, and subsequently regulations of November 3, 1909 (38 L. D., 288), were issued requiring more precision, it was added:

> "It appeared that the practice of allowing selections by the railway company as these selections were made had been of such long standing and such uniform practice that it would be unfair, if not illegal, to give retroactive effect to such regulations."

In point of fact, *no such practice had ever existed.* It is possible the company may have succeeded in getting lands patented under such description, as was stated by counsel in printed brief for the company, filed in that case, signed by Mr. Burr and others as attorneys for the company, wherein it is said:

> "No formal regulations were adopted under the Act of 1899, but it was instead informally arranged between the Department and the company that the latter selections should be made in the form and manner prescribed for selections under the Act of 1898. And this has been done for twelve years."

But the Hansen case was the *first case* decided where a *conflict between a settler and the company under this grant reached the Department for decision.* It cannot be doubted that the First Assistant Secretary, who signed the decision, was astounded when falsely informed by his subordinates that a "long standing and uniform practice" had existed to accept such a description as sufficient. If there had been such *practice, the rule, regulation, decision, or case or cases in which it had received official sanction would have been quickly pointed out. None such existed.*

On the contrary, the circulars issued under the Act of 1895, procured by the company for classifying of the identical lands (20 L. D., 350) contained the following provisions as to *unsurveyed* lands:

> "Observe the difference that the land must necessarily be described by natural objects and permanent monuments to identify the same."

And when that act was extended, under another administration, exactly the same language was used (39 L. D., 116).

Again, at the request of the Railway Company, an oral hearing before the Department was granted in its conflict with the homestead claim of Kip Calkins Miles, in which case an elaborate hearing had taken place and all the facts were in the record before it. Counsel representing the settlers challenged the Secretary, the Commissioner, and any and all the Assistant Attorney General's force who were present, to name a single case sustaining the claim in the Hanson case of a long uniform practice to accept such descriptions as sufficient, and *no case could be found.* But, was the Department fair enough to the settlers to admit this? Unfortunately it was not.

No other case was mentioned at the oral hearing, and as Mrs. Miles was present, during some disputed point she offered to be sworn and testify, but this was not per-

mitted. The course this case took thereafter needs only to be stated in plain unambiguous language to fully demonstrate our statement of lack of fairness to settlers in deciding their conflicts with the company under this grant. *No decision was rendered in her case as the result of this hearing*, requested by the company in her case, although as before stated, it was the only case mentioned by counsel on either side as then pending, involving this question. To our utter amazement it resulted in the decision of the Daniels case. This was not an accident, and when it is considered that the Daniels claim had been rejected and he had filed a contest in which the charge was made "that the selection was illegal and void, inasmuch as the company had wholly failed to post notice on the land," the course pursued would seem unaccountable, consistent with fair dealing, and yet, the difference in the proximity of surveyed lines in the cases would seem to account for making it the leading case instead of the Miles case in which the hearing was requested and which alone was argued. The decision in the Daniels case states:

> "Every person who took pains to examine the list understood that the western and eastern boundaries of the tract selected were respectively ¾ of a mile and a mile east of the western boundary of the township and that its southern and northern boundaries were 1¼ and 1¾ miles north of the southern Twp. line."

In other words, the nearest surveyed lines to the tracts were ¾ of a mile one way and 1¼ miles the other way. While this is the case, the nearest surveyed line to the land of Mrs. Miles' claim was 12 miles. And still further, when we literally begged the Department in her behalf to state *this fact* which was shown by a letter on file from the Commissioner, it was flatly refused and it was held it was ruled by the Daniels case, comment seems unnecessary. With such cases before us, it may sometimes be doubted whether the proud boast of Mr. Justice Mathews in the case of Yick Wo vs. Hopkins, 118 U. S. 356, as quoted and commented upon by Mr. Justice Brewer in the case of Gulf Col. & S. F. Ry. Co. vs. Ellis, 165 U. S., 150, as follows:

> "When we consider the nature and the theory of our institutions of Government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power"

was a little overdrawn. If this action was not arbitrary, and did not leave Mrs. Miles without a part of the legal remedy to which she was entitled, we do not know what to call it. The case at bar was nearly as bad, and if possible the action of the officers of the Land Department was even more arbitrary.

The Decision of the Circuit Court of Appeals.

After stating the facts, Circuit Judge Gilbert, speaking for the court, announced the following opinion and decision:

"Before Gilbert and Morrow, Circuit Judges, and Dooling, District Judge.

"The appellant contends that the land was not described in the railway company's list so as to designate the same with a reasonable degree of certainty. The appellees contend (1) that the lands were designated with a reasonable degree of certainty, and (2) that the acceptance of the list and the issuance of patent by the Land Office involved the finding of fact that the lands were designated with a reasonable degree of certainty, and that such a finding of fact is conclusive.

"(1) We find in this case no decision of fact that the description of the land as listed by the railway company designated the same with a reasonable degree of certainty. The record shows, on the contrary, that no decision was made on the facts of the case, and that the action of the Land Office was but the application of the settled rule of practice which it followed in all cases, that all unsurveyed lands listed by a railway company as lieu lands are designated with a reasonable degree of certainty if they are designated by the description applicable to them after they shall have been surveyed. Thus on the appeal the decision of the Secretary of the Interior states, not that the rejection of Delany's application

was supported by the facts, but that it was supported by the reasons given by the Department in its decision in Daniels vs. Northern Pac. Ry. Co., 43 Land Dec., 381. Turning to that decision, we find it stating that all lists filed for lieu lands by railway companies were accepted under general regulations of the Department in every case where the lands were described in the terms of future survey, and the decision points to the Act of Congress of July 1, 1898 (30 Stat., 620, c. 546), which provided that lands under that act be selected in terms of a future survey, as sanctioning the propriety of the settled practice of the Land Department.

"Conceding that the Act of 1898 had the meaning attributed to it, it is to be observed that a year later, in enacting the statute under which the lieu lands were selected in the present case, Congress adopted a different provision and required, not that the lands be described in terms of future survey, but that they be designated with a reasonable degree of certainty, which, as we take it, means that Congress was not satisfied that the prior statute and prior practice were adequate in every case for the description of listed lands, but that other means of identification might become necessary in view of possible facts which would render the description in terms of future survey inadequate. In the present case, it is clear that the particular circumstances attending this lieu land selection were not taken into consideration by the Land Department. They did not decide that the description was reasonably sufficient, as applied to this particular tract of land. They applied only a

rule of practice, and in so doing decided a question of law and not a question of fact.

"A similar case was before us. West vs. Edward Rutledge Timber Co., 221 Fed., 30; 136 C. C. A., 556, in which we sustained the court below in ruling that the railway company's designation of a list of unsurveyed land by the description by which it would be known when surveyed was legally sufficient, where the tract was within three miles of a surveyed township and could be located with approximate certainty. In that case we said:

" 'It may be conceded, in so far as it respects this case, that a description of a section or a quarter section by legal subdivisions in the fastnesses of the Cascades or Rocky Mountain ranges, far distant from any government survey, or even generally that a description in terms of future survey, is not such a description as is contemplated by the statute. What may be a sufficient description for designating the tract under one set of circumstances might be wholly insufficient under another.'

"Our decision was affirmed in West vs. Rutledge Timber Co., 244 U. S., 90, 37 Sup. Ct., 587; 61 L. Ed., 1010. In that case the court said:

" 'What was a description having "a reasonable degree of certainty" was to be determined by the circumstances. It was in the nature of a question of fact and had tests for decision, as the Court of Appeals pointed out.'

"This means that the question is in the nature of a question of fact when it is determinable according to the proper tests applicable to facts. It does not mean that the adoption and application of a general rule of practice by the Land Office is a decision of a question of fact.

"(2) We are of the opinion that to designate the section of land in which the section in controversy is situated in terms of a future survey was wholly insufficient to designate the same with a reasonable degree of certainty. In the West Case, this court said:

"'But the farther they remove from an established survey, it stands to reason, the greater will be the difficulty of setting foot on the identical tract, until eventually no reasonable being could expect another to tie back to a known surety for the purpose of identification.'

"With the uncertainty there foreshadowed we are here brought face to face. The homestead settler here could not, without the expenditure of a large sum of money, ascertain in what section his land would be when finally surveyed. The land was 7½ miles from a known survey, and the intervening space was a rough, mountainous, timbered country. Even if he had gone to the expense of a survey, he could not know that the Government survey would coincide with his. By the Act of May 14, 1880, c. 89, 21 Stat., 141 (Comp. St. §§ 4536-4538), he was given the right to make his homestead upon unsurveyed lands. He duly marked the boundaries of his claim,

and made his residence thereon. He selected a parcel of land in an unsurveyed township, with nothing on the ground or on record in the plats of the local land office to notify him that the tract had been selected by the railway company. Said the court in Lytle vs. State of Arkansas, 9 How., 314, 333 (13 L. Ed., 153):

"'The adventurous pioneer, who is found in advance of our settlements, encounters many hardships, and not infrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed one hundred and sixty acres. That this is the national feeling is shown by the course of legislation for many years.'

"And in Ard vs. Brandon, 156 U. S., 537, 543, 15 Sup. Ct., 406, 409 (39 L. Ed., 524), the court said:

"'The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon.'

"The view which we have taken of this branch of the case renders it unnecessary to consider the other assignments of error.

"The decree is reversed, and the cause is remanded to the court below, with instructions to enter a decree for the appellant as prayed for in the bill."

Although counsel after reciting the decision of the Circuit Court of Appeals and the District Court in the West Case, are unkind enough to say of this decision:

"Yet in the case at bar the Court of Appeals in the teeth of its own decision and the decision of this court in the West Case, and by a process of reasoning we find it hard to follow, held the description insufficient and reversed the decree of the District Court. * * * And its decision went on exceedingly narrow lines."

It is to be regretted counsel find themselves in such serious trouble to understand the reasoning in a decision which is contrary to their contention, and to the interest of their clients, but we hardly think this is the fault of the court. It seems to us the decision fully sets out its reasoning in the West Case, as a proper basis for its decision in this case, and we must differ from counsel and say, in our opinion it is in entire harmony with its decision in that case and its affirmance by this court as well.

But they bring a more serious charge against the decree of the court in this case. At page 19 of their brief they are at considerable pains to point out a number of inaccuracies of description of the facts found by the court below, contained in the statement prefixed to its opinion, concluding, however, that

"These inaccuracies may be of no great importance—in our view of the case they are, of course, immaterial. But taken together they give the case a color and twist which tends to convey a false impression, especially as to what counsel called the 'equities' of the claimant Delany and some sort of impression seems to have influenced the Court of Appeals itself."

After expressing confidence in the sincerity and good faith of these eminent judges, they said:

> "But we think the opinion evinces an unfortunate looseness of grasp of the facts and the record. Nothing less could explain the court's extraordinary error respecting the issue decided by the Land Department, which error is the very foundation of the decision appealed from." We are sorry our brothers lost their usual serenity in argument, and so far forgot themselves as to charge, that although in their view the inaccuracies they set out in the courts quoting the decision of the facts as found by the court below," are immaterial, "taken together they give the case a color and twist which tends to convey a false impression and that the opinion evinces an *unfortunate looseness of grasp of the facts and the record.*"

Why all this, if in their opinion they are immaterial. If immaterial, why quibble over them? But the sting is added in the last paragraph wherein it is said:

> "Nothing else could explain the court's extraordinary error respecting the issues decided by the Land Department, which error is the very foundation of the decision appealed from."

Quite a waste of words, it strikes us, to get at this most remarkable charge, which in our opinion is without any foundation.

This particular grievance against the decision of the court is based upon the failure of the court to set out or

refer to the following language in the decision of Assistant Secretary Jones in denying Delany's petition for the exercise of the supervisory power of the Secretary, which failure it is claimed goes to the very foundation of the decision appealed from, viz.:

> "The description employed in this particular selection, *under the description in Daniels vs. Northern Pacific Railway Company, supra, complied with the statute*, as it was made with a reasonable degree of certainty."

This was and is but another way of expressing the rule laid down in that case as to what was necessary to comply with the statute. An examination of that decision shows it states:

> "Every person who took pains to examine the list understood that the western and eastern boundaries of the tracts selected were, respectively, *three-quarters of a mile and a mile east* of the western boundary of the township and that its southern end boundaries were *one and a quarter and one and three*-quarters miles north of the southern township line."

That decision lays down the rule, based upon this selection that:

> "If, therefore, at the date of the selection any line of public survey has been established in the *vicinity* of the selected land (three-quarters of a mile), it is not believed that a selection *like the one under consideration* lacks, in fact, any reasonable certainty."

Will it be seriously contended when the decision on the motion for supervisory power was denied and the Department said,

> "under the decision in Daniels vs. Northern Pacific Railway Company, the selection complied with the statute, as it was made with a reasonable degree of certainty,"

it was intended to be held it occupied the same relation to established lines of survey, as was the fact in that case? If so, it is a fraud on its face, false in every particular and contradictory of the record, of which the court will take judicial notice. Caha vs. U. S., 152 U. S., 211; Heath vs. Wallace, 138 U. S., 573.

In our printed brief on this motion filed in the Department, among other things we said:

> "In the Daniels case you held that at date of selection a public survey was established three-fourths of a mile and a mile east of the western boundary of the township and that its southern and northern lines one and a fourth and one and three-fourths miles north of the southern township line, holding this was in the 'vicinity.' Shall we consider this a fixed rule, or is the question left in all cases to the writer of the decision or the person who signs it, *for in the case at bar, no public survey is referred to, without which such a description is not a compliance with the law as thus held.* If the only thing the Daniels case settled was to allow all kind of latitude in construing the word 'vicinity,' and the rights of settlers are left to

the individual views of the writer of future decisions, or of the official signing the same, then, so far as settlers are concerned, the Daniels case might as well not have been decided, but the question still left in the air, as it undoubtedly is if such a construction is to prevail.

"It is this 'unlimited, undefined discretion' against which the Supreme Court in a recent case of Daniels vs. Wagner, 237 U. S., 547, inveighed in no uncertain terms."

The answer to this was the paragraph the omission of which is complained of by appellants. How then can it be urged Secretary Jones considered the facts held in the Daniels case as necessary to constitute a compliance with the act? Certainly it would be most unreasonable, and we are quite sure will be so considered by this court.

Again in an action in the courts in such case, what may be properly considered as the decision of the Department? Is it the original decision which the Department refuses to entertain a motion to rehear? Or, is it the decision refusing to grant the petition for the exercise by the Secretary of supervisory authority? In both of which disturbance of the decision is refused. If the decision which the Department refuses under both proceedings allowed by the Rules of Practice to disturb, then what was said in refusing to grant our petition is not a part of the decision, and hence immaterial? Upon inquiry, at the Department we were told it would be glad if this court would settle that question.

This decision is in entire harmony on this point with their decision in the West case, which was affirmed by this court (244 U. S., 90). In both decisions it was held the question whether the description given was a compliance with the statute which required such a description as would designate the land with reasonable certainty, was one depending in some measure at least upon its proximity to established lines of survey, and that each case must depend upon the conditions shown to exist.

I.

Argument.

We have devoted considerable attention to the proper construction of the Act of March 2, 1899, for the reason that counsel for appellants in their brief, insist it was and is, proper to apply to the execution of the act rules and regulations formulated by the Department under various other acts which are entitled to different construction; insisting the act should have a reasonable as opposed to a strict construction. To avoid any possible misstatement of their position, we quote the following from the first page, subdivision 6, of their brief as their contention:

> "As the railway company's selection was made in exact compliance with the procedure required by departmental regulations, practice and rulings, it cannot now be overthrown by a retroactive decision that the rule thus established by the Department was erroneous."

At p. 23 they go further and say:

> "In discharge of the duties thus imposed upon them, the officers of the Land Department determined that a description in terms of future survey was not only sufficiently definite and certain to comply with the act, but was the best, most convenient and most practical form of description. For in the regulations to which reference has already been made, the Land Department not only permitted this form of description, but made it mandatory and exclusive—save in exceptional cases with which we are not here concerned."

The only part of this statement to which we are prepared to give our hearty approval of its accuracy is that "it was the most convenient form of description," if no thought be given to the rights of intending settlers or other claimants, which would seem to be the case, for any clerk could sit down in its office and cover a township with paper selections in an incredibly short time, while the settler must not only make his settlement, establish his residence, but must post his notices on the land and mark his boundaries. Notwithstanding the earnestness with which they attempt to sustain their position, by the citation of and quotation from a large number of departmental decisions and circulars governing other acts, they utterly fail to show by any, or all of them combined—

First, That any circular was ever issued for the carrying into effect of this act, which, we have seen, contain most unusual requirements and gave the company the

right to select nearly a half million acres of unsurveyed land in nearly all of the great public land States.

Second, That by any decision, order, or other official act the company was ever authorized to apply the requirement of circulars governing the execution of other acts in making its selection.

Three, That any railroad or other grant made by the United States contained the same requirements as are specifically made in this act.

It may be observed that their statement is "the Land Department determined." But this is their statement only, and evidently was oral and rests in the memory, as no record is referred to to sustain it. The Land Department determines such matters, particularly where so large a body of land may be selected under such "*absolutely new and essentially different requirements* from that of any other act which they were ever called upon to enforce, by some official act of record not resting in the memory of the attorneys of the company, or others, for that matter. As we have seen, in the oral argument in the Miles case counsel for the company, and the Assistant Secretary of the Interior, the Commissioner of the Land Office and the Assistant Attorney General for the Department and his principal assistants, being present, were challenged to furnish a reference to any official action sustaining this claim, then, as now, made. *None was cited, none ever has been and never can be.*

What, then, becomes of the contention that not only were selections such as those in this case, *permitted*,

but were *mandatorily and exclusively required.* Under what circular and by what specific order? Such a statement should be backed up by reference to this remarkable direction or order. Their position, as stated at page 5, is, that "by regulations originally adopted by the Interior Department, in the administration of similar lieu selection acts previously enacted, permitting the selection of unsurveyed lands, such regulations were by *the Department made applicable to selection under the Act of 1899.*"

The Circular of May 9, 1899 (28 L. D., 521), under Act of June 4, 1897, known as the Forest Lieu Act, is quoted as sustaining this contention. But does it do so? This regulation, even if applicable (which it is not), allows a description such as that in the case at bar only when "practical." The most that can properly be said of this regulation is that it is a concession that there may be cases in which it would be practical to so describe land, but it was evidently meant this was the exception, just as the Circuit Court of Appeals and this court held in the West case, *supra.* But the fact that it is followed by the requirement of a metes and bounds description when it is not practicable should be convincing evidence of the fact that counsel are in error when they state this first form was made mandatory and exclusive.

These are most unusual requirements, not at all in harmony with the practice of the Land Office under either its Rules of Practice, or of regulations or instructions governing the disposal of cases under general or special acts,

and there should be some official action shown why this was done under this act.

Reference is made to the Hanson case, the Daniels case, and the decision of the District Court in the West case, but *not to that of the Circuit Court of Appeals nor of this court in the latter case.* An examination of the Daniels case (43 L. D., 581) shows it does not bear out this contention. What is there said is, that "these regulations contained a provision broad enough to cover all selections of unsurveyed land under any Act of Congress in which the *only requirement* as to description was that the land should be designated according to the description by which it would be known when surveyed if that be practicable."

But there is *no such requirement* in the Act of March 2, 1899, and in no other one, so far as we now recall, except possibly that of July 1, 1898, contains such a requirement. We need not add that the Circuit Court of Appeals successfully met the contention as to this act, by the statement that in the enactment of the Act of 1899 Congress was not satisfied with the requirements of that act, and required that it should be described in such manner as to "designate the same, with a reasonable degree of certainty."

Neither the Hanson case, *supra*, nor the Daniels case, cited, sustain their contention.

In conclusion, upon this point, can it be necessary to again call attention to the fact that at the date of this selection, July 23, 1901, this Circular, quoted and relied

upon had been specifically and in terms, revoked, viz., on Dec. 18, 1899 (29 L. D., 391). The same is true as to the Circular of August 11, 1898, and of Nov. 15, 1899, and the Circular of December 18, 1899, substituted in their stead.

Now this substituted circular as shown at bottom of page 392, provides as follows:

> "In all selections of unsurveyed land, notice of selection commencing within 20 days thereafter, must be given for a period of 30 days, by posting upon the land and in the local office, and by publication at the cost of the applicant in a newspaper designated by the Register as of general circulation in the vicinity of the land and published nearest thereto."

If, then, as claimed by counsel, circulars issued under the Act of June 4, 1897, were applicable and were applied mandatorily and exclusively by direction of the Land Department instead of the description given, in addition to this requirement, the selector was required to give thirty days' notice by posting on the land and in the local office and by publication in a newspaper to be designated by the Register. *This circular was the only one under this act in force at the time of the selection in this case.* Will it still be insisted this circular was applicable? If so, this branch of the contention must fall to the ground. The statement in the Daniels case, *supra*, that the instructions of May 9, 1899, were applied by the Land Department to all selections of unsurveyed lands until the adop-

tion of the regulations of November, 1909, is likewise erroneous, and so far as shown, without any foundation whatever in fact. The same may be said of the decision in the Hanson case (38 L. D., 491), wherein the Department refused to make the circular of November 3, 1909, retroactive for the reason that "the practice of allowing selections by the railway company as these selections were made had been of such long standing and such uniform practice that it would be unfair, if not illegal, to give retroactive effect to such regulations" although made specifically retroactive on their face. It is sufficient to say he was misinformed. In both instances this circular of May 9, 1899, not then being in existence, having been revoked within seven months and nine days from its date, viz., from May 9 to December 18, 1899, upon which date the latter circular which we have seen requires notice by posting on the land and in the local office and by publication in a newspaper was substituted, none of which requirements were complied with in this case.

In support of our position, in addition to the fact that when challenged to show any official action, authorizing such practice, none could be shown, there is on file in the Land Department a letter of First Assistant Secretary Adams, addressed to the Commissioner of the General Land Office, in answer to his argument against the soundness of the departmental decision in the case of F. A. Hyde *et al.*, 40 L. D., 254, wherein, referring to the Hanson case, it is said:

"The text of that decision does not show whether or not Hanson settled before survey, and for this and other reasons I do not at this time care to express an opinion as to the soundness of said decision." * * *

"In conclusion I have to say that in the study of the various acts of Congress, above mentioned, I was profoundly impressed with the thought that while they permitted and authorized the initiation of claims to unsurveyed lands, they all evidently contemplated that such lands should be identified in some appropriate and effective way. There is nothing in any of these acts justifying another conclusion. If, in the administration of these laws, *it has been assumed that identification would be accomplished by such description as is now contended for on the ground of precedent, such assumption was unwarranted.*

"To describe a tract of land as what will be, when surveyed, a certain parcel of the public domain is certainly indefinite. It means nothing except that in such case the selector thereby expects to initiate a preference claim to land somewhere without giving notice to other persons who may wish to make an appropriation under the same or other laws, and who, after he has gone upon the public domain, in pursuance of such lawful design and marked his claim, and perhaps cultivated and improved it, may be awakened years thereafter to find that it is lost to him by reason of a prior appropriation of which he had no notice either in law or in fact. *The proposition, therefore, seems to lead to a preposterous result,* and in my opinion, cannot be entertained."

January 16, 1912, nearly two years after the decision in the Hanson case, viz., March 16, 1910, the foregoing letter of Secretary Adams was written and is a complete refutation of the finding in that case as to the practice in the Department. It is true Secretary Hitchcock, in the case of A. J. Herrall (29 L. D., 553) declined to enforce this circular against him on the ground that his claim had been regularly accepted and approved before the date of the act. But the selection at bar was not only not accepted, but was not made until a year and a half after these substituted regulations were in force. So much for circulars under the Act of June 4, 1897, which counsel claim were applicable and were by the Land Department mandatorily and exclusively required to be applied to its selections of unsurveyed land under the act. The attention of the Land Department and of the courts was specifically called by us to these facts, but do not seem to have had any attention. As to the refusal to make the circular retroactive because it would be unfair, if not illegal, Secretary (afterwards Justice) Lamar in the matter of railroad indemnity selections had no hesitation in making his drastic circular of August 4, 1885 (4 L. D., 90), requiring such companies to supply bases, tract for tract, for all their selections made in bulk as had been the practice for many years, *retroactive*, requiring them to submit such basis in *all of their selections theretofore made if it had not been done.* Neither did Secretary Noble in the case of Florida Central & Penn. R. R. Co.

(15 L. D., 529) hesitate to approve and commend this feature of the circular.

Secretary (now Senator) Hoke Smith in his decision in the case of La Bar vs. N. P. R. R. Co. (17 L. D., 406), also required the selections tract for tract and enforced this retroactive circular.

It follows that even if such practice had ever existed, which has never been shown to have been the case, the departmental decision was not sustained by these rulings. But aside from the lack of official evidence of the practice of applying circulars under other "similar" acts as asserted, long after they had been specifically revoked, as we have shown, let us see what the Department has held on the subject of the practice in cases which may be considered as somewhat similar.

The Department in the *Hanson case* (38 L. D., 491) declined to make the circular of November 3, 1909, retroactive on the ground that as it was *not in existence* at the time of the location it would be unfair to apply it. On the other hand, in the case of *State of Idaho* vs. *N. P. Ry. Co.*, 37 L. D., 135, the departmental decision met the claim of the State that the Acts of 1898 and 1899 were similar and that the circular of February 14, 1899, 28 L. D., 103, was applicable to selections under the Act of 1899, by the statement that, "it was issued *prior* to the passage of the Act of 1899 and it is clear the direction therein contained could have no reference thereto."

We thus have one decision holding a circular issued before the act is not applicable for that reason alone, and the other that a later circular was not applicable because issued after date of the act.

It is conceded that no circular was ever issued under the Act of March 2, 1899. And, with the departmental holding that circulars under acts somewhat similar issued before the date of the act, are applicable only to the extent that they appear to justify what is admitted to have been a *bad* practice, and not held to apply to what is admittedly a very *proper* practice, viz., that of giving notice of the selection; and on the other hand holding that a circular issued after the date of the act and the date of the selection does not apply, we are told that the beneficiaries of this private act must be given against bona fide settlers the benefit of, at most, a shady, doubtful admittedly wrong practice, the origin of which, if it ever existed, is so shaded in doubt and uncertainty as that no circular nor decision clearly sustaining it can be produced; without requiring it to comply with the circular which *was* in existence at the time its selection was made and the favorable language of which has been invoked in the departmental decisions, to sustain the selection.

If an effort had been made to discover instructions which might have been reasonably applied, in the absence of any instructions under this act, it would seem the company and the Land Department would have turned to those issued under the Act of February 26, 1895, "to pro-

vide" for the examination and classification of certain mineral lands in the State of Montana and Idaho, which was procured by the company.

And in the Instructions under the Act dated April 13, 1895 (20 L. D., 350), the Commissioners are instructed as follows:

> "Classification shall be made and the minutes of the Board containing the decisions as to the conclusions reached, shall state that the lands classified are examined by legal subdivisions (where the lands have been surveyed), (and where unsurveyed, by tracts of such extent and designated by such natural or artificial boundaries to identify them, as the Commissioners may determine), and give the area thereof."

Again at page 353 in the same Instructions by Secretary Smith, Par. 6, the Commissioners are instructed as follows:

> "And thereafter (after examining the surveyed land) shall as rapidly as practicable examine and classify in the same manner all unsurveyed lands in their respective districts within said grants, *observing the difference* that the lands *must necessarily* be described by *natural objects or permanent monuments to identify the same*, returning the area of unsurveyed tracts classed as mineral."

The statute also required that this report should be filed in the office of the Register and Receiver and a duplicate forwarded direct to the Secretary of the Interior and notice given by publication. The same Instructions called especial attention to the fact this classification is final and the Department has held that it is conclusive against the railroad claim. Again, we submit, no difficulty was found in having tracts described by natural objects. This circular was issued April 13, 1895, more than six years before these selections were made.

The railway company was certainly satisfied with this circular, for it procured a provision in the Sundry Civil Act of June 5, 1910, to complete the examination and classification of its lands in Montana and Idaho which were not completed under the Act of 1895. This circular bears date July 26, 1910 (39 L. D., 116), and makes the same requirements as to the description of unsurveyed lands as the circular required under Act of 1895, viz., "*when unsurveyed*, by tracts of such extent, and designated by such natural or artificial boundaries to identify them, as the Examiners may determine, and give the area thereof."

Certainly at these dates a metes and bounds description was the settled practice in the Department.

The latter circular is a joint one signed by Asst. Secretary Pierce, and Director George Otis Smith, of the Geological Survey, and as shown on their face, apply to lands within the grant of this company in the States described.

Notwithstanding their failure in attempting to show the method of selecting was made mandatory and exclusive by the different decisions and regulations relied upon, revoked long before, counsel assumed they had established the fact that the railway company's selection was made in exact compliance with the procedure required by departmental regulations, practice and ruling, and it is contended, it cannot now be overthrown.

We fail to see how it has been shown the selection was made in accordance with any specific procedure, regulation, practice or ruling, but on the contrary we think we have shown it was not. In the leading case in the courts quoted from, viz., James vs. Germania Iron Co., 102 Fed., the rules of practice were relied upon. This is a very different proposition. The Rules of Practice are general and apply alike to all classes of cases coming before the Department. Again, in many of the cases cited and quoted from, a *vested right* had been acquired by compliance with regulations or practice, while in the case at bar no vested right was acquired by filing the selection. At most it was a step preliminary to acquiring such right, depending upon the filing of the new list within ninety days after the plats of survey were filed in the local office.

We believe in all the cases the existence of the rule was in full force, the practice under it was uniform and of long standing and the construction claimed conceded. No dispute about the facts upon which the Department

and the courts were called to pass; while in the case at bar it has been demonstrated by the published decisions of the Department, the regulations upon which counsel rely were not only not applied, and in no sense applicable, as they were based upon statutes requiring essentially different requirements, and in fact, some of them had been *officially revoked prior to the selection.*

Again, many of the cases like that of United States vs. MacDaniel, 7 Pet., 1, which counsel describes as a great leading case on the subject, arose on the validity of the payment of special allowances, paid under a practice or usage which was afterwards abrogated. In such cases there is no probability any rule, regulation, or official order was ever issued, either before or after this case arose. But does counsel think it applicable to the proceedure and practice in the Land Department, all of which are steps in the acquisition of title to public lands, and which can have no force unless in pursuance of some *specific statutory* authority?

In other words, the Land Department has no power whatever to convey away, or in any wise encumber a foot of the public lands, except in pursuance of some positive statute. Counsel insist there is no room for distinction, with respect of the principle declared in the authorities cited, between cases where the rule which was held to protect a claimant was a rule established by express regulation or decision, but built up by custom, usage or practice.

The principle applicable may be the same, but where the facts are not admitted, but disputed, the method of establishing the custom, or practice when no part of any decision, regulation, rule, or any other official sanction, and as stated it is disputed, as in this case, it is very different. When such matters rest wholly in memory, and the assertion is made nearly twenty years after the filing of the list, there is a very broad difference.

And even in case of circulars, like that of May 9, 1899, under Act of June 4, 1897, which was revoked and another circular specifically substituted for it seven months after it was issued, viz., December 18, 1899, both of which are published in the Land Decisions (28 L. D., 521, and 29 L. D., 391), the Department, in the Hanson case, by decision rendered, more than ten years after such revocation and substitution, and in the Daniels case (43 L. D., 381) decided August 3, 1914, nearly fifteen years thereafter, seriously treated this revoked circular as having been in force until November 3, 1909, *more than nine years after it was specifically revoked.*

But counsel are entirely mistaken in their view, of the legal effect to be given the decisions of the Department in such cases. To say they cannot be overthrown is to ignore two well-settled principles the courts apply. As held by Judge Sanborn in the case of James vs. Germania Iron Co., 107 Fed., 597, quoted from by counsel, who, after stating their legal effect, added:

"But it is also equally true that when by Act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent transfer no title and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

Judge Sanborn, after stating the legal effect of a land patent of the Government, qualifies his broad statement by adding the following:

"But the judgment and conveyance of the Department *do not conclude* the rights of the claimants to the land. They rest in *established principles* of law and fixed rules of procedure, which condition their initiation and prosecution, the application of which to the facts of each case determines its right decision; and if the officers of the Land Department are *induced to issue a patent to the wrong party by an erroneous view of the* law, or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless."

Here is what the court says he may do:

"He may establish his equitable right on two grounds:

"1st. That upon the facts found, conceded, or established, without dispute at the hearing before the Department its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the patent to him. A number of Federal Court cases are cited and the following decisions in this court: Cunningham vs. Ashley (14 How., 377); Bernard's Heirs vs. Ashley's Heirs (18 How., 43); Garland vs. Wynn (20 How., 6); Lyttle vs. Arkansas (22 How., 306); Johnson vs. Towsley (13 Wall., 72); Moore vs. Robbins (96 U. S., 530); and Bernier vs. Bernier (147 U. S., 242)."

How strange it is that learned counsel should have entirely overlooked this qualifying or explanatory paragraph following that part of the decision quoted by them!

In the last-above case cited Bernier vs. Bernier, Justice Field, speaking for the court, it was said:

"When a patent for land is issued by mistake, inadvertence, or other cause to parties not entitled to it, they will be declared trustees of the true owner, and decreed to convey the title to him," quoting Stark vs. Stark (73 U. S., 403).

In the case of the Wisconsin Ry. Co. vs. Forsyth, Mr. Justice Brewer, delivering the decision of the court, said, touching this point:

"But further, it is urged that this question of title has been determined in the Land Department adversely to the claim of the plaintiff. This is doubtless

true, but it was so determined, not upon any question of fact, but upon a construction of the law; and such matter, as we have repeatedly held, is not concluded by the decision of the Land Department. Johnson v. Towsley, 80 U. S., 13 Wall., 72 (20:485); Shepley v. Cowan, 91 U. S., 330 (23:424); Quinby v. Conlan, 104 U. S., 420; Doolan v. Carr, 125 U. S., 618, 624; Lake Superior Ship Canal, R. & I. Co. v. Cunningham, 155 U. S., 354."

But why pursue this argument? Counsel pressed the same position, quoting many of the same authorities in the Circuit Court of Appeals, and also in this court, in the West case (244 U. S., 90). But both courts considered and passed upon the questions which they are still insisting are so concluded by the departmental decision that this court is estopped for lack of jurisdiction to consider them.

There is nothing better settled than that questions of law passed upon by the Department may be reviewed by the courts; and that, even in mixed questions of law and fact, if they can be separated, the questions of law may be considered by the courts.

The courts have universally held that where the facts are all admitted or undisputed, that what is "*reasonable*" within the meaning of any given statute is a question of law for the courts.

"Whether the regulation of a Railroad Company, separating white and colored people and providing separate cars for each race was a reasonable one or

not the facts being admitted, is a question of law for the court."

Chilton vs. St. L. & Iron Mt. R. Co., 19 L. R. A., 269.

"The construction of a written contract where no extrinsic evidence is necessary to explain its terms and also of an oral contract where its terms are admitted is a question of law for the court."

9 Cyc., 591.

Dennis vs. Natl. Bank, 38 Wash., 439; 80 Pac., 764.

"What is a reasonable time to object to items of an account rendered, the dates being clear, is a question of law."

Fleischner vs. Kubli, 25 Pac., 1089.

Standard Oil Co. vs. Van Etten, 107 U. S., 333-334. 27 Law. Ed., 322.

"A police regulation must not extend beyond that reasonable interference which tends to preserve and promote enjoyment generally of those inalienable rights with which all men are endowed, etc. • • • and that whether an act purporting to be within the field of police power is reasonable or not, in the ultimate is a judicial question."

Bonnett vs. Vallier, 116 N. W., 885; 17 L. R. A. N. S., 486-491.

State vs. Redmon, 114 N. W., 137; 14 L. R. A., N. S., 229.

This being true there is no doubt concerning the rights of the court to review the action of the officers of the Land Department in this case.

"Where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive. *But if it can be made entirely plain to a court of equity that, on facts about which there is no dispute or reasonable doubt, the officers of the Land Department have, by a mistake of law, deprived a man of his right, it will give relief.*"

Marquez vs. Frisbie, 101 U. S., 473. B. 25 Law. Ed., 800.

Whitcomb vs. White, 214 U. S., 17; Book 53 L. Ed., 891.

But counsel contend at p. 13 of their brief, that even in questions of mixed law and fact, its determination is final and conclusive and not subject to review by the courts citing a number of authorities. The latest case in this court cited is that of Ross vs. Day (232 U. S., 110). While the court in that case went to the extreme limit, in our opinion, yet, we do not understand it supports the broad position of the appellants. It is said:

"But, in our opinion, whether plaintiffs had improved the lands in such sense as to give them a preferential right under the statute was not a mixed question of law and fact. So far as it involved an appreciation of the term 'improvements,' as employed in the statute, it was a question of law; so far as it involved the drawing of correct inferences from the evidence, it was a question of fact. At *best, it was a close question*, about which reasonable men might differ."

The court then quotes from Whitcomb vs. White (214 U. S., 15) the rule stated in that case, and add:

> "And this rule is applied in cases where there is a mixed question of law and fact, unless the court is able to so separate the question as to see clearly what and where the mistake of law is, quoting Mr. Justice Miller in Marquez vs. Frisbie (101 U. S., 476), as follows:
>
> "'This means, and it is a sound principle, that when there is a mixed question of law and of fact, and the court cannot separate it as to see clearly where the mistake of law is, the decree of the tribunal to which the law has confided the matter is conclusive.'"

In the case of Burfenning vs. Chicago, etc., Ry. Co. (163 U. S., 321), from which counsel quote, at p. 14 of their brief, Mr. Justice Brewer delivering the opinion, after stating the settled rule as to the conclusiveness of their decisions as to facts, continues:

> "But it is also equally true that when by Act of Congress a tract of land has been reserved for homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent *transfer no title*, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey any public lands in disregard or defiance thereof."

St. Louis Smelting & Refining Co. vs. Kemp (104 U. S., 636);
Wright vs. Rosebury (121 U. S., 488);
Doolan vs. Carr (125 U. S., 618);
Davis vs. Weibold (139 U. S., 507);
Knight vs. U. S. Land Association (142 U. S., 161).

"The court then quotes at length from the case of Morton vs. Nebraska (88 U. S., 21 Wall., 660) and the case of Texas & P. R. Co. vs. Smith (159 U. S., 66)."

We would also invite attention to the case of Daniels vs. Wagner (237 U. S., 547).

In the well-considered case of Wiggins vs. Burkham (77 U. S., 10 Wall., 129), this court held:

"The proposition that what is reasonable time in such case is a question for the jury, as laid down by the court below, cannot be sustained. Where the facts are clear, it is always a question exclusively for the courts. The point was so ruled by this court in Toland vs. Sprague, 12 Pet., 336. See also Lockwood vs. Thorne, 11 N. Y., 175, and 2 Pars. Cont. Note c 661. Where the proofs are conflicting the question is a mixed one of law and of fact."

In the case of Standard Oil Company vs. Van Etten, 107 U. S., 325, the court held:

"It is next objected by the plaintiff in error, that the court below erred in its rulings upon the account offered and admitted in evidence and which, it was

claimed was a stated account. The claim on this part of the case is, that an account rendered becomes an account stated, unless objected to within a reasonable time; that what constitutes a reasonable time in such a case is a question of law; and that an account stated cannot be impeached except for fraud or mistake, and in support of these propositions, counsel cite Perkins vs. Hart, 11 Wheat., 237; Toland vs. Sprague, 12 Pet., 334; Wiggins vs. Burkham, 77 U. S., 884; Lockwood vs. Thorne, 11 N. Y., 170, and other cases.

"There is no dispute but that this is a correct statement of the law and it is precisely what is charged by the Circuit Court."

The courts have uniformly held that where the facts are all admitted or undisputed, that what is "reasonable" within the meaning of any given statute, is a question of law for the courts. Chilton vs. St. L. & Iron Mt. R. Co., 19 L. R. A., 269; 9 Cyc., 591; Dennis vs. National Bank, 38 Wash., 439; 80 Pac., 764; Fleischner vs. Kubli, 25 Pac., 1089; Bonnett vs. Vallier, 116 N. Y., 885; State vs. Redmond, 114 N. W., 137.

Where there is a mixed question of law and fact, and the court cannot so separate it, as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive. But if it can be made entirely plain to a court of equity that, on facts about which there is no dispute or reasonable doubt, the officers of the Land Department have, by a mistake of law, deprived a man of his right, it will give

relief. Marquez vs. Frisbie, 101 U. S., 473; Whitcomb vs. White, 214 U. S., 17.

In the case at bar, there is no dispute as to the facts and has never been any. It follows that even if the court should hold it is a mixed question of law and fact, there can be no difficulty in separating them and determining whether there has been a mistake of law made upon the admitted facts.

We shall not take up the time of this court in discussing what counsel are pleased to term the reasoning of the Circuit Court of Appeals, in this case, as a "brand new position, which is so extraordinary that it must be stated in the language of the court itself, as nothing else could do justice." The decision speaks for itself and the court needs no defense at our hands. Furthermore, we have already discussed this charge in a former part of this brief and will add nothing further here.

Description in Terms of Future Survey.

How far this court may consider its decision in the West case as finally settling the question that a description of unsurveyed land by the number of the section, township and range, it will be given by the surveyor, as a sufficient description in any case; and if in any, whether it must depend upon the distance from established surveyed lines, the physical conditions presenting obstacles to precisely locating the land in each case, and to a degree whether the land is subject to other selection or to settle-

ment, we are not advised. But, as this is the only case that has been decided by the court, so far as we know, holding such designation a sufficient description, under the conditions existing, we beg to suggest that all of the decisions in that case limit the class of cases to land which is located in proximity to established surveyed corners or lines.

In the decision in the West case, the Department held that such public survey must have been established "*in the vicinity*" of the selected land to make the selection sufficient. The District Court confined it to still narrower limits by holding that such public survey must have been established in the "*immediate* vicinity," the definition of which is equivalent to *adjoining*. The Circuit Court of Appeals laid down what would seem to be a hard and fast rule by saying:

> "A description by legal sub-division is a perfectly intelligible designation of a tract of land; so it must follow that a description which will be a legal sub-division when surveyed, if lying *adjoining* a sub-division, already surveyed, is also a perfectly intelligible description."

And even further limited this general rule by adding:

> "It may be conceded, in so far as it respects this case, that a description of a section or a quarter section by legal sub-divisions in the fastnesses of the Cascades or Rocky Mountain Ranges, far distant from any Government survey, *or even generally*, that

a description in terms of future survey, is not such a description as is contemplated by the statute.

"Now, if we move away a step farther from the established survey, and describe the tract to be selected as Section 12, Township 1 North, it would not be a difficult task to set foot on the land and determine accurately its limitations. There would still be a reference back, or a tying back, to Section 36, Township 1 North. But the farther the removal from an established survey, it stands to reason, the greater will be the difficulty of setting foot on the identical tract, *until eventually no reasonable being could expect another to tie back to a known survey for the purpose of identification.*"

In the case at bar they say a removal of 7½ miles is such a distance that no reasonable being could expect another to tie back to a known survey for the purpose of identification.

But that court was led into an error in applying this rule to the West case, by assuming, as stated, that the subdivisional survey of the township would correspond to that north of it and a measurement could be made with approximate accuracy from corner of section 32, to section 20, where the West land was located; when in point of fact, as we demonstrated in this court on appeal, the plats show it did not close on that corner by nearly a quarter of a mile, the corner of section 5, the one immediately south being located that far east of the corner of section 32. Moreover, no account was taken of the lotting on the north side of Tp. 44, R. 3, containing the

West land, the township being "deficient in containing 36 full sections, to the extent of 346.13 acres as shown by the Commissioner's letter, Appendix 'A'."

In none of these decisions, however, has it been held such a description is sufficient *per se*, but all depend upon aids in locating the particular land.

We have been inclined to the view of this question taken by Judge Cushman, in the District Court of South Dakota, April 10, 1913, in the case of Sawyer *et al.* vs. Gray *et al.*, wherein he held:

> "The township plat having been filed in April, 1901, the lands in dispute were unsurveyed at the time of the first alleged selection. The Government survey *creates*, not merely *identifies*, sections of land. There were no such lands as those described in the first application at the time of selection in question. U. S. vs. Curtner (CC), 38 Fed. 1; So. Pac. R. Co. vs. Bullingame, 5 L. D. 415 and cases cited; Robinson vs. Forest, 29 Cal. 317; Middleton vs. Low, 30 Cal. 596; Bulock vs. Rouse, 81 Cal. 590, 22 Pac. 919; Smith vs. City of Los Angeles, 158 Cal. 702, 112 Pac. 307."

The case of U. S. vs. Curtner first above cited (38 Fed. 1) was before Mr. Justice Field and Circuit Judge Sawyer for the Circuit Court, northern District of California, and decided February 4, 1889.

In the case of Smith vs. Los Angeles (112 Pac. 307), the Supreme Court of California held:

> "Even after a principal meridian and a base line are established and the exterior lines of a township

surveyed, the sections or sub-sections *do not have a legal existence*, until they are established by an *approved survey under authority of Congress.*"

The case of Bullock vs. Rouse, 81 Cal. 594, held the same as the District Court of South Dakota, that is, that the sections of land are not "ascertained" by the Surveyor but they are "*created.*"

It follows that if this doctrine is sound and we know of no decision to the contrary, the description of land before survey as what particular subdivision it will be when surveyed, describes nothing on earth and must be void for any purpose.

This is in accordance with our contention all through this controversy, viz., that there are only two *possible methods of describing lands*, one by *metes and bounds or natural objects* which is a description *in fact*. The other is a *legal description*, which as held by the Circuit Court of Appeals is perfectly intelligible *after survey* under our system, but there is *no survey*, legally considered, until approval by the Commissioner. This was fully settled by this court, Mr. Justice Hughes delivering the opinion, in the case of U. S. vs. Morrison, 240 U. S., 192, and is one of *law*. Prior to the approval of the survey there can be no description of land possible except by metes and bounds or natural objects. There can be no question, therefore, that the selection in this case is *absolutely void because it describes nothing in existence.*

In Central Pacific Railroad Company vs. Nevada, 162 U. S., 512, Mr. Justice Brown speaking for the court, used the following language:

> "The lands granted to the railroad company were the odd numbered sections within the limits of 20 miles on each side of the railroad, except such as had been sold or otherwise disposed of by the United States or to which a homestead or pre-emption claim had attached, or mineral lands.
>
> "Until the surveys were made it cannot be known what part of the lands are within the enumerated exceptions, or what sections or parts of sections will belong to the company, nor until then can the locality of the lands be determined so that a description may identify them.
>
> "It must be borne in mind that the unsurveyed lands are not described by metes and bounds or by common designation or name but as sections and parts of sections, and, as alleged by the complaint as their designation will appear when the surveys of the United States are extended over them. It is plain that this is not a description by which the identity of the land can be established, and is equally plain that possession of the lands cannot be established until the surveys are made."

In a suit by the Bird Timber Company vs. Snohomish County *et al.* to cancel taxes levied against the company for the years 1912 and prior years, the Supreme Court of the State of Washington (81 Wash. 416-143, Pac. 433), in a selection under the Act of June 4, 1897, held as follows:

"In the first place, we think the description of the property contained in the selection (in the terms of a future survey) is insufficient to designate any specific tract of property. At the time the selections were made there were not, nor is there now, any specific tract of land marked on the ground which can be located by the descriptions contained in the selections. It may be that in course of time the Government will survey certain lands, and denote them in the surveys in accordance with the descriptions in the selections contained in the Hayes selections; but it is reasonably certain it will not designate any tract in accordance with the description contained in the Goldberg selection.

"This tract, if the present system of surveys is pursued, will border on a township line, and will in all probability be fractional in quantity, in which case it will be designated in fact by lots numbered instead of the general description contained in the selection.

"But be this as it may, *there is no means of ascertaining prior to the actual Government survey, what specific tracts of land will be included in the description.*

"They (the words 'there be and is hereby granted') vests a present title, though a survey of the lands and location of the road are necessary to give precision to it, and attach it to any particular tract * * * until the identification of the even and odd-numbered sections the United States retained a special interest in the property at least, etc. * * * It was error, therefore, in the trial court to admit the survey made by Ashley."

As also bearing upon this point this court in the case of U. S. vs. Morrison (240 U. S., 192), involving the question whether prior to survey, Congress could make other disposition of the 16th and 36th sections theretofore granted to the State of Oregon, Mr. Justice Hughes speaking for the court among other things, said:

> "Prior to survey, the designated sections were undefined and the lands were unidentified."

After stating that the people were not interested in getting the identical 16th and 36th sections is was said:

> "Indeed, *it could not be known* until after a survey where they would fall."

Again—

> "Until the status of the lands was fixed by a survey, and *they were capable of identification*, Congress reserved absolute power over them * * * the State was to be compensated by other lands equal in quantity, and as near as may be in quality. By this means the State was fully indemnified, the settlers ran no risk of losing the labor of years and Congress was left free to legislate touching the national domain in any way it saw fit to promote the public interests."

On the point of the impossibility of identifying land before surveys, the Supreme Court of Idaho, in the case of Rogers vs. Hawley (115 Pac., 687), in giving the reasons

for exchanging the 16th and 36th section in a forest reserve for surveyed lands outside, stated:

> "Under the rule adopted by the Supreme Court of the United States in U. S. vs. Montana Lumber and Mfg. Co., 196 U. S., 573, and followed by this court and other courts. Azcuenaga Bros. Live Stock & Land Company vs. Cortt (115 Pac., 18); Clemmons vs. Gillette, 33 Mon., 321; 83 Pac., 879, and U. S. vs. Burdeye, 137 Fed., 70; C. C. A., 100, there is no method whereby the State can identify an unsurveyed section of the public domain, and no evidence would be admissible to identify a school section until after the Government survey has been made. In the absence of any means of locating the section on the ground and identifying it, the State cannot lease the land to anyone and can consequently, realize no profit or income from any unsurveyed section."

The case of the U. S. vs. Montana Lumber Co., 196 U. S., 573, referred to by the Supreme Court of Idaho, **supra**, was an action in trespass against the Railway Company for cutting timber on the land prior to survey. The company claimed that by a private survey made by it, the land in question was shown to be an odd-numbered section which belonged to the company under its grant, and therefore it could not be liable for trespass in cutting timber on the land granted to it. This court, Mr. Justice McKenna, speaking for the court, said:

> "The survey of the land is left to the Government; in others words, the identification of the sections—whether odd or even, is reserved to the Government."

Again, he quoted approvingly from the decision in the case of Leavenworth L. & G. R. Co., 92 U. S., 733, as follows:

As to when a survey is complete it was said:

> "It necessarily follows that the making of a survey and its approval by the Surveyor General of Oregon, did not make the survey complete as an official act. It still remained subject to the examination and approval of the Commissioner. * * * If title passes upon survey, it must be upon the survey duly completed according to the authorized regulations of the Department."

If, therefore, the State of Idaho, as held by her Supreme Court, and the State of Oregon, as held by this court, with all their great power and resources, were unable to identify the 16th and 36th sections granted to them, how, we may ask, is what the district court in the West case held to be the "land-hungry" homestead claimant, without means, perhaps, living in a tent and carrying his supplies sixty to seventy-five miles on his back, as was the case with most of the settlers in this vicinity," to identify the tract, the company has selected without furnishing him a more definie means of identification than Congress furnished these States in their grant?

These decisions also completely overthrow the doctrine that a tract might be identified if in the vicinity of a surveyed line, for section 36 is always the southeast corner of a township, which corner is the one from which, under

the manual of surveying the survey is always commenced in the absence of special instructions to the contrary.

Instead of such a description being "reasonably certain" as required by the law, it is *most unreasonably uncertain.*

Again, in the case of F. A. Hyde *et al.*, decided October 6, 1911 (40 L. D., 284), under Secretary Fisher's administration, after a very thorough consideration of the question of such a description under the Act of June 4, 1897, which did not require the strict description required by the Act of 1899, it was held it was insufficient and that the land could not be *sufficiently identified* for anyone to make an affidavit that it was "unoccupied" as required by the statute. It follows that there has not been a uniform construction of the statute. The decision of the Hyde case remained the settled doctrine of the Department from October 6, 1911, until changed August 3, 1914, in the Daniels' case, 43 L. D., 381.

The selection by the company in this case is neither a description in fact nor one in law. In point of fact it does not purport to be a *description* of land. It is only a designation of a certain number which some unknown quantity of land may bear after the official survey which is based upon a marking on the ground. It is what Assistant Secretary Jones described as an "*expected or hypothetical description,*" 42 L. D., 259.

We do not believe that we can express with as much force and accuracy as did First. Asst. Secretary Adams in his letter to the Commissioner, the grounds of the insuffi-

ciency of the description of lands in terms of a future survey. We therefore at the expense of repetition quote as follows:

> "To describe a tract of land as what will be, when surveyed, a certain parcel of the public domain is certainly indefinite. It means nothing except that in such case the selector thereby expects to initiate a preference claim to land somewhere without giving notice to other persons who may wish to make an appropriation under the same or other laws, and who, after he has gone upon the public domain, in pursuance of such lawful design and marked his claim and perhaps cultivated and improved it, may be awakened years thereafter to find that it is lost to him by reason of a prior appropriation of which he had no notice either in law or in fact. The proposition, therefore, seems to lead to a preposterous result, and in my opinion cannot be entertained.
>
> "In conclusion I have to say that in the study of the various Acts of Congress above mentioned, I was profoundly impressed with the thought that while they permitted and authorized the initiation of claims to unsurveyed lands, they all evidently contemplated that such lands should be identified in some appropriate and effective way. There is nothing in any of these acts justifying another conclusion. If, in the administration of these laws, *it has been assumed that identification* would be accomplished by such description as is now contended for *on the ground of precedent, such assumption was unwarranted.*"

But even if sufficient under other statutes, it seems to us if we follow the rules of construction of acts of Congress laid down by standard authorities and of this court is followed, it would seem impossible to so construe this act as to permit such a description. Sutherland on Statutory Construction, 2d Ed., says:

> "The intent of the statute is the law."
>
> "To find out the intent is the object of all interpretations" (Sec. 364).
>
> "Intent first to be sought in language of statute itself" (Sec. 366).
>
> "If the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framer of the instrument, there is no occasion to resort to other means of interpretation. The statute itself furnishes the best means of its own exposition" (Sec. 366).

In the case of Lake County vs. Rollins, 130 U. S., 70, the Supreme Court said:

> "Where the law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

In Lewis vs. The United States, 92 U. S., 21, the court said:

> "When the language of the statute is transparent, and its meaning clear, there is no room for the office of construction. There should be no construction where there is nothing to construe."

In the case of Platt vs. Union Pac. R. Co., 99 U. S., 559, this court said:

> "Congress is not to be presumed to have used words for no purpose.
>
> "The admitted rules of construction declare that a legislature is presumed to have used no superfluous words."

It also held:

> "Statutes should be so construed, if practicable, that *one section will not defeat or destroy another, but explain and support it.*" Justice Field in Burrier vs. Burrier (147 U. S., 242).

> "*Every clause* in a statute *should have effect, and one portion should not be placed in antagonism to another.*" United States vs. Lanham (118 U. S., 85).

Applying these settled rules to the statute in question it is *absolutely impossible* to harmonize the requirement of the filing of a new list after survey to conform thereto, and finally if this list does not precisely correspond with the survey the company is permitted to further conform it, with a description of a certain section, town and range. We have seen it has long been held by the courts that there is no such thing in existence as sections, townships

and ranges before approval of the survey, but that they are created by the survey. It follows such description designates nothing then in existence. Furthermore, a conformation is impossible unless the lines are marked on the ground, for the land marked on the ground by the surveyor which corresponds with the member selected *must necessarily* be the exact land selected and no other land could by any possibility be substituted for it under the guise of conformation, as might be the case under a metes and bounds or natural objects description, as is frequently the case when settlers mark out the boundaries of their claims and post notices. Therefore, aside from every other consideration the act on its face contemplated a metes and bounds or natural object description as surely as if it had been required in so many words; and to give each clause its effect, which is certainly practicable and has been required by the courts, it must be so held.

The learned Circuit Court of Appeals contrasts these provisions with the requirements under the Act of 1898, and very properly held Congress in the enactment by the Act of 1899, determined to abandon and did abandon the description required in that act, and required one of "reasonable certainty," which, if it means anything, it must have been such as to put others on notice of the locus of the claim. The fallacy of the argument in support of such a description loses sight of the fact that the purpose of Congress in requiring such a description as would designate the land with reasonable certainty was

not for the benefit of the company alone, for if no one else could initiate a claim to the land it would be in a sense immaterial—at least a question between the company and the Government only. But when it is considered that homestead settlers had a right to settle on the land under the Act of 1880 and mark out their claim on the ground, settle and reside upon it; the State of Idaho had a right to request its survey under the Act of 1894, as was done in this case, forest lieu land selectors and perhaps others had a right to initiate claims to the land, it is plain Congress did not intend to place them at the mercy of the railway company by placing upon them the burden of making a survey, not to find the land they wanted, but to find what they must "keep off of," as it had been selected without anything to indicate its locus. And even then the best of surveyors could not have located the claims of the company with any degree of accuracy—admittedly if not "*adjoining*" or in the "*immediate vicinity*" of an established line of survey. It seems to us no sane person could imagine Congress could have intended to put such a burden upon the settlers, who, as held in Lyttle vs. Arkansas, *supra*, this court held "national legislation had for many years treated tenderly." Whatever may be held, we shall never believe this was contemplated by that body. We hardly think counsel could have been serious when at page 26 of this brief they say:

> "This would have been just as easy (a metes and bounds description), and just as practicable for the

railway company to do so at the time of selection—had it been required. * * * Such a description would have been not merely 'reasonably certain,' it would have been mathematically certain. * * * Yet such a description would have meant no more, for any practical purpose, would have furnished no more information and would have made the land no easier to identify than the description which was prescribed by the Department and used in the selection."

Counsel here not only states a proposition which upon its face looks unreasonable, but controverts the position of the Department in the Hanson case, *supra*, upon which they have been wont to rely.

And the trial court in its decision in the West case said:

"The argument rests wholly upon the assumption that if the method (in terms of future survey) is authorized at all, it is exclusive; but such an assumption is plainly unwarranted. The act does not purport to require any given form of description, but upon the other hand gives the widest latitude; its only requirement is that on the selection list the lands shall be designated with 'reasonable degree of certainty'; the method of designation is immaterial, provided it identifies the land. It was doubtless anticipated that different methods would be employed, as the provision above quoted was intended to point out the course to be pursued in cases where the *original description is not tied to the lines of an official survey, as here.*"

And in the Daniels case, *supra*, wherein it is said:

> "The metes and bounds description of unsurveyed land *should always have been*, as it *now is, required.*"

There are only two possible descriptions of land, viz., one by marking on the ground or by reference to natural objects, which is a *description in fact*, and the other a *description in law*. In the last analysis there is only one, as a description in law presupposes and is based upon a marking on the ground. That is, a *legal survey*. In public lands it is a description in law *only* after the approval of the survey by the Commissioner. Anything else is no description and no designation. F. A. Hyde *et al.*, 40 L. D., 284, citing U. S. vs. Montana Lumber Co., 196 U. S., 573.

II.

LAND NOT SUBJECT TO THE SELECTION OF THE COMPANY.

Was Reserved by Act August 18, 1894 (28 Sp., 394), from Any Adverse Appropriation, by the Filing of the State's Application for Survey of the Land, Prior to the Selection.

The District Court decided against our contention upon this point, and the Circuit Court of Appeals having sustained our claim that the land was not designated with a reasonable degree of certainty, as required by the act, did not consider it, but reversed the decision upon the

one point. Counsel in their appeal and brief take issue with our contention, and endeavor to sustain the action of the trial court. While we feel quite confident the action of the Circuit Court of Appeals will be affirmed by this court, yet we shall urge, briefly as may be, the grounds upon which we base our position.

We have no fault to find with the analysis of the act in question made by counsel at page 112 of their brief.

As said by Story, Justice in The Margaret, alias Fernando (9 Wheat., 424):

> *"What the policy of the act is can be known only by its provisions."*

And, as said by Chief Justice Marshall in Pennington vs. Coxe (2 Cranch., 52):

> *"The law is the best expositor of itself."*

Let us see, therefore, what are the provisions of the law.

The Act of August 18, 1894, authorizes the governors of certain mentioned States, including Idaho, to "apply to the Commissioner of the General Land Office for the survey of any townsip or townships of public land remaining unsurveyed, etc., with a view to satisfy the public land grants made by the acts admitting such States. And upon the application the Commissioner shall proceed to immediately notify the Surveyor-General of the applica-

tion made for the withdrawal of said lands; and the lands that may be found to fall within the limits of such townships, as ascertained by the survey, *"Shall be reserved upon the filing of the application for survey* from any adverse appropriation settlement or *otherwise* until the expiration of sixty days from date of filing township plat, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim and such as may remain unselected at the expiration of that period, and not otherwise appropriated according to law, "Shall be subject to disposal under general laws as other public lands."

Whether the filing in this case by the Governor with the Surveyor-General of the State, and its transmittal by him to the Commission was contemplated or not, is entirely immaterial, for the reason that it is not disputed; the record shows it was received by the latter official at a date prior to the date of the filing in the local office of the company's selection, to wit, July 15, 1901. Northern Pacific Railway Co. vs. State of Idaho *et al.* (39 L. D., 503, at 588). The real question is, whether the land was immediately withdrawn by virtue of the positive words of the statute, which are, that it *"shall" be reserved upon the filing of the application,* not only from the claims of the company, but from *any* adverse appropriation by settlement, or *otherwise.* This was intentionally made so broad as to *cut off possible claims,* except that of the State. Otherwise it would have been of no practical benefit to such State. It seems to us, unless we ignore the

plain, positive, unambiguous words of the statute, in line with the former efforts of Congress to protect the States in the grants made to them, which this act undertook to remedy, for the sole purpose of preventing *from the day of filing the application with the Commissioner* the attachment of *any* claim to the land within the township for sixty days after official survey, and if selected within that time it stood as a valid State selection without any action of the Commsisioner or any other official. All the other things required of the State or the Commissioner looked solely and only to the giving notice to the public of the State's claim, but no part of it could by any possibility defeat the positive language of the statute which immediately reserved it from all forms of appropriation. Such being the evident intention of Congress, the exact language of the statute, it must be upheld by the courts.

The position of the appellants, as stated, is, that the question whether a valid application for survey becomes effective before selection by the railway company on July 23, 1901; and if so, it will be necessary to determine whether this application resulted in an absolute reservation, or withdrawal of the land, so that no rights attached under the railway company's selection, notwithstanding the State failed to make a valid selection of the land and did not require any rights therein.

Following this, in a way which seems to be quite usual in their brief, it is asserted "both these questions have been determined adversely to our theory by" *numerous decisions* of the Land Department, "as well as by the

District Court in the case at bar." No decisions of the Land Department are cited. Possibly their statement which follows may account for this, for they say, "the facts with respect to the application fo rsurvey are somewhat complicated, and there are some inconsistencies in the earlier decisions of the Department which tend to confusion." They might have added in practically all of them, both earlier and later, except the thoroughly considered case of the Railway Company vs. The State of Idaho (39 L. D., 583), decided March 20, 1911, which recites all of the objections of the company and decided in favor of the State and directed the cancellation of the selection lists embraced in said decision. But counsel very conveniently got rid of this thorough consideration of the identical questions involved in the case at bar, in which they were considered from any angle, even the able attorneys of the company could present against the State's claim, by asserting without any reference to specific decisions, that in this "one case, and one only, is a contrary view expressed. But that case stands alone and unsupported; it is inconsistent with all other prior and subsequent departmental decisions on the subject (of which there are many), and it has since been expressly overruled and repudiated." If this decision has been expressly overruled and repudiated, as asserted, it would seem counsel would have given a specific reference to where such decision, or decisions, may be found. In the absence of such information we have made a careful examination of the cases overruled or modified published

in each volume of the Land Decisions from the 29th to and including the 46th, or last one published, and find it is not reported by the Department as having been either overruled or modified.

In our reply brief in the Circuit Court of Appeals it was specifically stated that this decision was followed in the case of Carrie E. Shearer vs. Northern Pacific Ry. Co., decided March 5, 1913, two years thereafter (not reported).

In the Shearer case, the Commissioner, discussing this same application of the State of Idaho, and the right of the homesteader as against the attempted selection on the part of the Railway Company under the Act of March 2, 1899, being a case raising the identical questions raised in the case at bar, said:

> "Subsequently, instructions were requested of the Department as to the State's said application, list No. 9, with others, and the company's selections in conflict therewith, and acting under departmental instructions of March 20, 1911 (39 L. D., 583), this office, on May 8, 1911, rejected the State's application list No. 9, with others, for University purposes, as excess selections.
>
> "Said departmental instructions directed this office, in consideration of the settlement claim, to reject such as are based upon settlement made subsequent to July 31, 1905, the date the company filed the additional list, adjusting the selection to the public survey, and stated that as to settlements made prior to that date, and made in good faith, by a qualified

homesteader and since maintained in accordance with law, priority would be accorded, and, upon allowance of entry for lands so settled upon, the company's selections would, to that extent, stand rejected."

Counsel attempt to distinguish the application of the State of Idaho for survey, from all other methods or attempts to appropriate public lands, and claim that this particular method of appropriation does not initiate a claim to the land, and hence does not except these lands from lands which the appellants were entitled to enter. In other words, they claim that the appellants might file their application to select this land subject to the prior and superior rights of the State to appropriate it. This is contrary to the view expressed by the courts in numerous cases.

In the case of McIntyre vs. Roeschlaub, 37 Fed., 556, a homestead entry was made on the land in question by one who was an alien and not entitled to enter any land under the homestead laws. The successor of the railway company in that case contended that the attempt to enter the land under the homestead laws having been made by an alien it was void, and therefore no right or claim attached to the land. In disposing of that question, the court said:

"Within the reasoning of that case, I think the contention of the complainants cannot be sustained. So far as the records of the Land Office disclose, a proper homestead entry had attached. The Govern-

ment had accepted the filing of the entry by Mary Hooper. Whether it should afterwards permit that entry to ripen into a perfect title, or should challenge her right to perfect the entry, were matters resting solely in the discretion of the Government. The right to inquire into the validity of the proceedings in the Land Office, regular in form, was not granted to the railroad company. Such right of inquiry remained personal to the Government. It occupied the position, not of a vendor, but of a donor. It limited its gifts to lands to which a homestead right had not attached. Whenever it accepted a homestead entry, its acceptance removed the land from the terms of the grant. What should become of the matter thereafter as between the person making the entry and the Government was a matter that did not affect the railway company. It had no right to inquire. The Government might have waived all the informalities and defects in the person, or in the occupation, and issued its patent. Whether it did or not was a matter of which the railroad company could not complain. It was enough for it, that upon the face of the records there was an apparently valid homestead entry, one which the Government recognized, and one which it might finally permit to ripen into a perfect title. The homestead claim, whether good or bad, in the language of the act, '*attached*'; and that is all the railroad company could inquire into. That being settled, the land did not pass under this grant."

The case in 39 L. D., 583, decided March 20, 1911, specifically held:

"Selections by the Northern Pacific Railway Company under the Act of March 2, 1899, *proffered subsequent* to the application of the State for survey of the lands under the Act of August 18, 1894, and while the lands were reserved from appropriation adverse to the State, are not, upon rejection of the subsequent application by the State, entitled to recognition as of the date of presentation, to the prejudice of the rights of settlers."

The Commissioner was then instructed, as stated in the Shearer case, that "in the consideration of settlement claims your office will reject such as are based upon settlement made *subsequently to July 31, 1905.* As to such settlements as may have been begun prior to that date, if made in good faith by a qualified homesteader, and since maintained in accordance with law, *priority will be accorded,* and upon allowance of entry for the lands, etc., settled upon the company's said selections, will, to that extent, stand rejected." * * * After the adjustment of these claims clear lists of the company's said selections will be forwarded for the approval of the Secretary of the Interior unless objection arises not herein considered.

Again, more than ten years after the State's application and that of the company were filed in the case of Thorpe *et al.* vs. State of Idaho (42 L. D., 15), decided March 22, 1913, the Department, after a full consideration of the decision of the Supreme Court of Idaho, in the case of Rogers vs. Hawley *et al.* (115 Pac., 687) and the confirmatory statute of 1911, said:

"This Department has never had any doubt as to the validity of these selections (of the State). Its concern was because of the seeming declaration of invalidity pronounced by the court. * * * This difficulty has now been removed and it is not material whether the court changed its mind upon the question or whether the invalidity suggested by the court in the first instance has been cured by legislation. In either case no good reason exists why said departmental decisions should not be carried into effect. They are therefore hereby reaffirmed and the necessary steps will be taken to put them into effect. In the adjustment of the State's grant, however, under those decisions due regard will be had for the State's wishes in the matter of the protection of such equitable claims as may be, or have been, preferred by settlers who were misled by the failure of the Commissioner of the General Land Office to cause to be noted said withdrawals upon the records of the local Land Office."

A year thereafter, to wit, March 10, 1914, the Department in the case of Thorpe *et al.* vs. State of Idaho (43 L. D., 168) saw a new light and not only had doubt, but held it had been wrong from the beginning and reversed former decisions in conflict with that, holding, in effect, the Commissioner not only had the power to reject the State's application for survey, but did reject it. However, like counsel in the case at bar, failed to refer to any such decision, or make any explanation as to how this fact had been first discovered thirteen years after it is

alleged to have taken place, nor to the decision in 42 L. D., 15, just a year before, wherein it said: "*The Department never had any doubt as to the validity of these selections.*"

This is certainly a very unsatisfactory decision from every point of view.

Claim of the State, the Railway Company and of Delany.

On July 15, 1901, the Governor of the State of Idaho made application for survey under the Act of August 18, 1894.

On July 23, 1901, the Northern Pacific Railway Company filed lieu selection list No. 71 under the Act of March 2, 1899.

On June 21, 1903, Delany settled on this land in suit.

On June 4, 1909, official survey was made and filed in the Local Land Office.

On June 10, 1909, Delany made application for homestead entry.

The record in this case shows that Delany's homestead application was rejected by the Local Land Office on August 31, 1909, for the reason, "that the same is all in conflict with the selection by the State of Idaho" (Record, p. 115). Delany appealed from the decision of the Local Land Office, and on December 16, 1909, the Commissioner of the General Land Office affirmed the decision of the Local Land Office, saying in part:

> "It appears, however, that said T. 43, N. R. 4, E., with a number of others was withdrawn from settlement or other appropriation adverse to the State,

under date of July 5, 1901, upon application of the Governor of Idaho, under the Act of August 18, 1894 (28 Stats., 394). The language of the statute is in part as follows:

"'And the lands that may be found to fall in the limits of such townships, as ascertained by the survey shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise, except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office.'

"Unless, therefore, it could be shown that you were a settler on said N.E.¼ of Sec. 20, prior to the date of the application for the withdrawal by the Governor, the State's right to said tract, under its indemnity selection, is superior to yours, and since it appears that at the date of your application, said tract was covered by the State's list, your application was property rejected by the local officers.

"Very respectfully,

"Fred Dennett, Commissioner."

On March 20, 1911, First Assistant Secretary of the Interior in reviewing the law of this case, and having under consideration the identical question above referred to, said:

"'A sufficient answer to this contention is that for the purposes of this case it is immaterial that the Commissioner of the General Land Office refused

to "withdraw" these lands. By the terms of the Act of August 18, 1894, *supra*, under which the application for survey was made, the withdrawal became effective and was an accomplished fact upon the perfection of the application and while it remained for the Commissioner of the General Land Office to give notice of the withdrawal, the failure of that officer to do so did not defeat it. *The withdrawal was statutory and in nowise depended on the discretion of the Commissioner of the General Land Office* (Thorpe *et al.* vs. State of Idaho, 35 L. D., 640). This being true, and *the lands being withdrawn for a special purpose, they were not subject to selection by the railway company*, and this is true without regard to the question whether the State had previously apparently selected an excess of land to satisfy its grants.'

* * *

"*This office considered the company's selections as invalid when made because the lands applied for were withdrawn for the State under the Act of August 18, 1894, supra*, that the departmental decision on review was determinative of the company's claim to the lands in question and that the fact of the applications to select presented by the State being in excess of the area required to satisfy its grants in no manner cured the invalidity of such selections.

"Under this view of the matter, I am of the opinion the order of suspension of November 20, 1908, should be revoked, *the company's selections canceled, and the case closed as to the company.* * * *

"It is urged on behalf of the company, in substance: * * * (2) That, admitting for the sake

of the argument, though not conceding, that the State by its application for survey secured a preference right to select said lands in accordance with the provions of the Act of 1894, yet, if the State's selections failed for any cause other than defective application for survey, under well-settled rulings of the Land Department, the company's right would attach as of the date of its selections, and that it would be entitled to priority over claims of any character subsequently initiated.

"The prior adjudications in this case have proceeded upon the assumption that the State's application for survey of these townships was regularly filed, and that there was due compliance on its part with every essential requirement of law, the questions heretofore raised going to alleged failure of the Commissioner of the General Land Office to 'withdraw' the land upon such sufficient application and the question of legality of a withdrawal of lands admittedly largely in excess of the State's grant for all purposes. The *questions so considered were decided in favor of the State and those questions will not be reopened.*

"The law necessarily contemplated a withdrawal or reservation of more lands than were necessary to satisfy the State's grants, and the failure of the Commissioner of the General Land Office to issue an order of withdrawal in further assurance of the legislative intention, could not jeopardize such right as was accorded the State by said act. * * *

"There thus remains only the further contention that when the State's selections failed the rights of

the company attached as of the date of presentation of its lists. There is something in this argument, but not so much as is claimed for it. It has never been held by this Department in a case where the State made its selections under the Act of 1894 and in attempted exercise of its preference right, that upon the rejection of such selections intervening adverse claims for the same lands would be recognized as of the date proffered. *Specifically, it has surely never been held that proffered selections by a railway company, under any law, for lands covered by a valid application for survey under the Act of 1894, secured any legal rights whatever.* This act provides that such lands shall be 'reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office.'

"Now, at the date these railway lists were filed these lands *were reserved from appropriation adverse to the State.* No legal rights could, therefore, have attached under such filing. The State afterwards selected the land and thereafter the question of its right thereto was one between it and the Government, and that question was not complicated by the filing of intervening adverse claims, even though same were filed pursuant to and received in accordance with subsisting administrative policy. The contention made involves the consequence that in in-

stances where, after the State's application for the survey of the township under the Act of 1894. shall have been defeated by placing the lands in a national forest, still the railway claim would not be defeated by the creation of such national forest, and, therefore, by indirection, the superior claim of the State would be defeated by the inferior one of the company. Such a consequence would be wholly unfair, was not contemplated, and can not be tolerated.

"If, as matter of administration, and for the preservation of equities, the Land Department should determine to recognize priority in the initiation of these claims, inasmuch, as it has permitted the filing thereof while the lands were so reserved for a special purpose, upon the failure of such purpose it is believed this could legally be done, but while not fully advised of the situation with such minuteness as is desirable, enough of it is known to justify the conclusion that some of *this land is covered by the claims of settlers* and such claims, initiated as they probably were, in the belief that the State's preference right might not be asserted or might for other reason fail as to the lands settled upon, are, *under uniform rulings of the Land Department and the courts, entitled to the first consideration.*

"In the adjustment of the equities of settler-claimants, the question of good faith in the initiation and maintenance of such claims is of primary importance. The company's said lists, Nos. 133 and 135, embrace selections of unsurveyed lands, and it having been determined under the circumstances of this case that such *selections initiated no legal right,*

it follows that the filing thereof was not the assertion of such claim as would prevent a settler from acquiring equities which it is the purpose of this adjustment to protect. But after the filing of the townships plats of surveys and on *July 31, 1905,* which was within the time allowed by law, the company filed its additional list adjusting these selections to the lines of the public surveys. *These additional filings gave precision to the company's claim and such notice thereof to the public as would prevent the initiation of rights by settlement thereafter upon the lands so selected. This being true, in the consideration of settlement claims your office will reject such as are based upon settlement made subsequently to July 31, 1905. As to such settlement as may have been begun prior to that date, if made in good faith by a qualified homesteader, and since maintained in accordance with law, priority will be accorded, and upon the allowance of entry for the lands so settled upon the company's selection will to that extent stand rejected.*

"If entries of any sort have been inadvertently or mistakenly allowed for any of these lands, they will rest on the same basis as settlement claims, and if they do not fall within the rule above laid down for the adjustment of such claims, they will be canceled. After the adjustment of these claims clear lists of the company's said selections will be forwarded for the approval of the Secretary of the Interior unless objection arises not herein considered." (The italics are ours.)

N. P. Ry. Company vs. *State of Idaho et al.*, 39 L. D., 583.

Thus we see that from June, 1903, to March, 1911, or during the first eight years of Delany's settlement and homestead entry, his contest was with the State of Idaho, with the State winning at every turn. That is, during this period the claim of the State was upheld by the Land Department as superior to that of the settler. The claim of the Railway Company received little attention, and we see that whenever the Land Department considered the claim of the Railway Company it was flatly rejected apparently being considered worthy of but little attention.

But later on and on June 28, 1915, the State of Idaho having satisfied its entire grant, its application of July 5, 1901, was rejected and dismissed, and the contest then became one between Delany and the Railway Company, and on July 9, 1915, Delany's homestead application was held for rejection on the ground that it conflicted with the selection of the Northern Pacific Railway Company.

It is very interesting to note that this decision of July 9, 1915, by the Assistant Commissioner of the General Land Office rejecting Delany's homestead entry and sustaining the selection of the Northern Pacific Railway Company is based upon Delany's letter of appeal dated November 15, 1909, which appeal was decided by the Commissioner of the General Land Office on this same letter of appeal, on December 16, 1909.

On December 16, 1909, the Commissioner of the General Land Office in disposing of Delany's letter of appeal, held that the appeal should be dismissed, because the State's right to the tract was superior to that of Delany's (see Record, p. 115).

On July 9, 1915, the Assistant Commissioner of the General Land Office again deciding Delany's appeal based on his letter of appeal dated November 15, 1909, without any motion for re-hearing made on the part of Delany, and without any notice to Delany of such action, and in total disregard of the former decision on this appeal, dismissed his application upon the ground that it was in conflict with the selection of the Northern Pacific Railway Company.

Under the decisions of the Land Department effecting the land involved in this controversy from a time prior to the time the Northern Pacific Railway Company attempted to initiate any claim to these lands, to July 9, 1915, these lands were *"Reserved from any adverse appropriation by settlement or otherwise,"* in accordance with the exact language of the Act of August 18, 1894, Section 1 of which said Act being as follows:

> "That it shall be lawful for the Governors of the States of Washington, Idaho, Montana, North Dakota, South Dakota and Wyoming to apply to the Commissioner of the General Land Office for the survey of any township or townships of public lands then remaining unsurveyed in any of the several surveying districts, with a view to satisfying the public land grants made by the several acts admitting the said States into the Union, to the extent of the full quantity of land called for thereby; and upon the application of said governors, the Commissioner of the General Land Office shall proceed to immedi-

ately notify the Surveyor-General of the application made by the Governor of any of said States for the withdrawal of said land, and the Surveyor General shall proceed to have the survey or surveys so applied for made, as in the case of survey of public lands; and the lands that may be found to fall within the limits of such township or townships as ascertained by the survey, shall be *reserved upon the filing of application for survey from any adverse appropriation by settlement or otherwise*, excepting as to those rights that may be found to exist of prior inception for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of township plat of survey," etc.

Act of August 18, 1894, Federal Statutes Annotated, Vol. 6, page 374.

Hence the Railway Company could acquire no rights by the filing of its lieu selection list on July 21, 1901.

But in addition to the provisions of the Act of August 18, 1894, the Act of March 2, 1899, under which the railway company makes its claim, provides that the company may select only "*Public lands * * * not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of making such selection.*" Act of March 2, 1899, Sec. 3.

This language has been construed many times by the courts and at the time of the settlement of Delany, at the time of the filing of lieu selection list No. 71 by the Northern Pacific Railway Company, and at the time of filing its application by the State of Idaho under the Act of August

18, 1894, the rule of decision in all of the Federal Courts applicable to the case at bar, was that the Northern Pacific Railway Company by its attempted selection acquired no right whatever, and that the prior and superior right to the land under the facts shown, was in Beldon M. Delany.

We ask the Court to consider only a few of them.

The Company was authorized to select only "*Public Land.*"

> "By public land is meant such land as is open to sale or other disposition under general laws: land to which any claims or rights of others have attached does not fall within the designation of public land."
> *Barden* vs. *Northern Pacific R. Co.*, 145 U. S., 538; 36 L. Ed., 806;
> *Northern Pac. R. Co.* vs. *Hinchman*, 53 Fed., 526;
> *Northern Pac. R. Co.* vs. *Musser Sauntry Land, etc., Co.*, 68 Fed., 1000;
> *U. S.* vs. *Oregon, etc., R. R. Co.*, 69 Fed., 901;
> *Southern Pacific Ry. Co.* vs. *Brown*, 75 Fed., 90.

Again, the Act of March 2nd, 1899, provides that the railway company may select only lands which are "*not Reserved.*" These lands were reserved according to the decisions of the Land Department, and also by the express provisions of the Act of August 18, 1894, as we have already seen.

Again—The railway company could only select lands "*To which no adverse right or claim shall have attached or have been initiated at the time of making such selection.*"

"It is not the *validity of any claim, but the fact that such claim was made,* that excludes the land from the category of public lands within the meaning of the act in suit granting the right to select public lands."

S. P. Ry. Co. vs. *Brown*, 75 Fed., 90;
McIntyre vs. *Roeschlaub*, 37 Fed. Rep., 556.

If the lands were excepted from the lands which the company were authorized to select as lieu lands *at the time of the attempted selection,* subsequent abandonment by the State restored the lands to the public domain, but no rights passed to the railroad company.

Kansas Pac. Ry. Co. vs. *Dunmeyer*, 113 U. S., 629;
Hasings and Dakota R. Co. vs. *Whitney*, 132 U. S., 357.

The foregoing authorities hold in principle, that the application of the State of Idaho, *reserved the land.* That this application of the State was the *initiation of a claim within the meaning of the Act of March 2, 1899, and for that reason the land was not open to selection by the railway company.* Hence it must appear that the Land Department in deciding in favor of the defendant railway company erred as a matter of law. But if there could be any doubt about the matter it has been settled by the Supreme Court of the United States in St. Paul, M. & M. Ry. Company vs. Donahue, 210 U. S., 35, wherein the court construes language identical with that of the Act of March 2, 1899.

In the Donohue case the Court said:

"But the assumptions upon which these conclusions were based clearly disregarded the fact of the long possession by Hickey and his heir of the land during the pendency of the contest, and disregarded the previous and final ruling of the Secretary, made in February, 1903, which maintained the validity of the settlement of Hickey, and decided that, by such settlement, he had validly initiated a claim to the land. When this is borne in mind it is clear that the ruling rejecting the Donohue claim and maintaining the selection of the railway company was erroneous as a matter of law, since, by the terms of the Act of August 5, 1892 (27 Stat. at L., 390, chap. 382), the railway company was confined in its selection of indemnity lands to land nonmineral, and not reserved, 'and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection.—' When the selection and supplementary selection of the railway company was made, the land was segregated from the public domain, and was not subject to entry by the railroad company. Hastings & D. R. Co. vs. Whitney, 132 U. S., 357, 33 L. Ed., 363, 10 Sup. Ct. Rep., 112; Whitney vs. Taylor, 158 U. S., 85, 39 L. Ed., 906, 15 Sup. Ct. Rep., 796; Oregon & C. R. Co. vs. United States, 190 U. S., 186, 47 L. Ed., 1012, 23 Sup. Ct. Rep., 673."

St. Paul, M. & M. R. Co. vs. *Donohue*, 210 U. S., 35; 52 L. Ed., 949.

But there is another theory under which the appellee is entitled to recover in this case. It has been repeatedly

decided by the Federal Courts, including the United States Supreme Court, that patents issued by the Land Department for lands which have been previously granted, reserved from sale, or otherwise appropriated, are void. The reason being that the executive officers of the Land Department are without authority to act in the matter under the law invoked by the party seeking the patent in such case. Unless the lands for which patent is asked are within the class designated in the statute invoked as authority for the issuance of the patent the Land Department is without jurisdiction to act in the matter. For this reason it may even be shown in an action at law that the patent is void.

Morton vs. *Nebraska*, 88 U. S., 660; 22 L. Ed., 639;
Hannibal & St. Joe Ry. Co. vs. *Smith*, 76 U. S., 83; 19 L. Ed., 599;
Burlington & Missouri River Ry. vs. *Freemont County, Iowa*, 70 U. S., 567; 19 L. Ed., 563;
Lake Superior Ship Canal R. & I. Co. vs. *Cunningham*, 155 U. S., 354; 39 L. Ed., 183;
Burfening vs. *Chicago, St. P., M. & O. Ry. Co.*, 163 U. S., 219; 41 L. Ed., 175;
Minter vs. *Crommellin*, 18 How., 88; 15 L. Ed., 279;
Reichart vs. *Phelps*, 6 Wal., 160; 16 L. Ed., 149.

If the patent to the lands in suit is void for want of jurisdiction on the part of the Land Department as held by the foregoing authorities, then the appellee is entitled to the relief prayed for. In any event the appellee has

shown that the Land Department committed an error of law upon the state of facts shown in the record here. In order that the lieu selection of the defendant Northern Pacific Railway Company could attach to these lands upon the cancellation of the claim of the State of Idaho, and become a prior and superior claim to the claim of Beldon M. Delany, who was then a settler upon the lands, or in other words, that the lieu selection of the defendant Railway Company might take effect as of the date of the cancellation of the claim of the State of Idaho, all of the conditions must have then existed which were necessary to enable it to make an original valid lieu selection as of that date, and this the company could not do for the reason that the record shows that Beldon M. Delany was then a settler upon the land.

In other words, *when the claim of the State of Idaho was cancelled on June 28, 1915, Delany was then in possession of the land, residing thereon and had duly made his application to enter the same under the homestead laws of the United States, and the lands were not "vacant and unoccupied," and "lands to which no adverse right or claim had attached or been initiated,"* at the time of the cancellation of the State's right, and hence were *not subject to selection by the Railway Company.*

Thus we see that for over twelve years Delany maintained his actual settlement upon the land and his right to the land, under and pursuant to the then current decisions of the Land Office. That is, if the law had continued to be construed and interpreted the same as it was

construed and interpreted by the Land Department during the twelve years of Delany's settlement, then the lands in suit would have been awarded to Delany, and yet the appellant's now ask the Court to say that the claim of the State of Idaho, which was maintained for a period of over fourteen years, during which time it was sustained by the decisions of the Land Department, and under which the State of Idaho was actually awarded lands in settlement of its claim, was not in fact the initiation of any claim at all, not even an invalid claim.

We cannot agree with appellants' statement of the record with respect to the application of the State of Idaho for survey, wherein on pages 49 and 50 of their brief they say:

> "On July 30, 1909, after the filing of the township plat of survey in the local land office, application was made in the name of the State of Idaho to select this and other land in the township, under the indemnity provisions of the State school land grants, in lieu of certain designated sections 16 and 36 alleged to have been lost to the State by reason of their inclusion in forest reserves. The proffered selections were rejected, and the rejection affirmed by the Secretary on appeal. It was held that the application for survey made by the State under the Act of August 18, 1894, never became effective, and that the State acquired no preference right thereunder. And it was further held that even should it be conceded that the State had a preference right of selection, nevertheless under the constitution and laws of Idaho, as construed

by the Supreme Court of that State, the representatives of the State were without authority to make selections in lieu of the bases tendered; that an act of the Legislature of Idaho, passed February 8, 1911, had no retroactive effect; and that the proffered applications to select were in and of themselves unauthorized and void.

"It was also held that neither the application for survey, nor the attempt by the officers of the State to select the land in July, 1909, in any manner prejudiced or affected the validity of the Railway Company's selection of July 23, 1901; that that selection was in all respects regular and valid, and entitled the Company to the land; and that as Delany's settlement was made two years after selection by the Railway Company, he acquired no rights thereunder. As already stated, the State acquiesced in the decision and is out of the case."

The only thing in the record pertaining to this matter is a letter from the Commissioner of the General Land Office to the United States Surveyor General of Idaho, in which he requests the Surveyor-General of the State to procure a report from the Governor of the State of Idaho as to whether or not the State could not satisfy its grant out of lands already reserved. In which letter the Commissioner expressly states that "Pending the receipt of the report of the Governor *no action will be taken* in the matter of withdrawing from further disposal the lands," etc. (See Record, pages 81-82.)

It is true that the Commissioner on July 16, 1914, or thirteen years later, says in rejecting the State's application:

> "That on July 19, 1901, the Commissioner refused to withdraw the townships in question upon the ground that the areas embraced in previous withdrawals were sufficient to enable the State to satisfy its several grants."

It is this loose handling of old records by the Commissioner of which we complain. Can the Commissioner, by merely asserting the fact, make black really white? Is it any wonder that the court is asked to review a record which discloses such gross carelessness in the handling of facts? (See Record, pp. 86 to 97.) In this connection we desire to call the court's attention to the fact that in this very decision of the Commissioner, and on page 81 of the record, he says:

> "It was held that pending the receipt of a report from the Governor, no further action would be taken on the application for withdrawal," etc.

And again on page 92 of the record he quotes from a decision of the Department, holding:

> "That the withdrawal for the benefit of the State did not attach until July 15, 1901, the date the application was received in this office (G. L. O.), and was not a bar to the reservation of the lands for forestry purposes," etc.

This statement of the Commissioner is also made in the face of the further fact that the lands in question were actually withdrawn under date of January 20, 1905, after

the State had deposited the necessary cost of survey. It is this statement which seems to have misled the trial court, and a careful reading of his opinion will show but for this statement in the record the learned trial court would have reached a different conclusion.

Under another sub-division of appellant's brief they adopt as the settled and conclusive record in this case the statement of the record which they have theretofore "constructed," which in its final analysis is a conclusion of fact. Of course if they are permitted to use this statement as the record in the case, it would harmonize with their argument. Reference is made to the statement of appellants with reference to the assumption of the trial court that the Department rejected and disallowed the application for survey. We contend that the record shows that no such action was taken, as it was not taken at the time. *The reference in a ruling of the Department thirteen years later contrary to the record does not change the fact. Hence all* of the argument of appellants with respect to the jurisdiction of the Commissioner, and this ruling of the Commissioner becoming final by reason of no appeal being taken, is, in our opinion, entirely beside the question, and has no foundation of fact upon which it can rest.

Counsel seem to lay great stress and put great store on the statement that while the earlier decisions held the application of the State to be valid and binding, it was subsequently found that these decisions were due "partly

to failure to give due consideration to the facts surrounding the application for survey, and partly to an erroneous view of the functions and authority of the Commissioner in proceedings under the Act of 1894." While the facts really are that the later decisions referred to by counsel, and the decisions which did give due consideration to the "functions and authority of the Commissioner in proceedings under the Act of August 18, 1894," were all rendered and made *after the State of Idaho had no longer any interest whatsoever in this application, and after the State had selected the full quantity of land which it was entitled to select.* Then the Commissioner of the General Land Office, by reading into the record as of a date thirteen years prior thereto, made this wonderful discovery, that his predecessor in office had failed to give "due consideration to the facts surrounding the application for survey."

The Prior Right of Delany.

In the case of Cowles vs. Huff *et al.*, 24 L. D., 81, Secretary Francis, after full consideration, in an elaborate decision overruled a line of cases beginning with that of Henry Gauger, 10 L. D., 221, and sustained the doctrine of the decision in Allen vs. Price, 15 L. D., 424. In the case of Stewart vs. Peterson, 24 L. D., 575, cited in your decision, Acting Secretary Ryan, stating that under the first rule adopted in the case of Cowles vs. Huff, *supra*, no rights either inchoate or otherwise, are acquired to

lands involved in a pending contest, by an application to enter filed before the rights of the entryman have been finally determined, modified the rule so as to cover what he termed "a hietus between the time when the former entryman's rights are finally determined and the beginning of the period accorded a successful contestant within which to make entry," and directed the preparation of a circular prescribing the directions contained in the decision. This decision was dated June 14, 1899, and on July 14, 1899 (29 L. D., 29), this Circular was issued and is as follows:

> "In accordance with departmental instruction in the case of John Stewart vs. Minnie S. Peterson (28 L. D., 515), it is hereby directed that no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been cancelled upon the records of the local office. Thereafter, and until the period accorded a successful contestant has expired, or he has waived his preference right, applications may be received, entered and held subject to the rights of the contestant, the same to be disposed of in the order of filing upon the expiration of the period accorded the successful contestant or upon the filing of his waiver of his preferred right."

Now, it is clear if this circular applies to any cases except contest (about which more hereafter), the application of the railway company should have been rejected when the State's selection was made. It could be con-

sidered only after the expiration of the preference right period or the waiver by the contestant.

What was the effect of the selection by the State in the case at bar within the preference right period? That it segregated the land and is the equivalent of an entry there can be no doubt. Southern Pac. Ry. Co., 32 L. D., 51, approved in the case of Weyerhauser vs. Hoyt, 210 U. S., 380. It follows that when within the preference right period the State filed its selection of the land in controversy, which was accepted by the Land Department, *it was the duty of the Department to reject and cancel the railroad selection.* That it was not done is the fault of that Department and the settler cannot be deprived of any of his rights because of this failure. Ard vs. Brandon, 156 U. S., 524.

If it be conceded, as we are quite sure it must be, that the railroad application should have been cancelled when the State's selection was filed and that its selection after survey gave it no right, *what was the legal effect* of the acceptance of the State's selection regular upon its face, as it affected the railroad claim?

If the circular referred to can be applied to this case, then the State must be treated as a contestant. It would not be insisted that after the contestant exercised his preference right and made entry, the railroad selection, a second applicant to contest, would be longer a valid claim. It has been held that where at time of selection by the company, the land was occupied by a settler, it was excepted, and even though afterwards abandoned, the selection did not attach. 37 L. D., 193 and 502.

In the case of Leete vs. N. P. Ry. Co., 37 L. D., 37, the Department held (Syllabus):

> "The allowance of an entry upon an application pending at the time of the presentation of a railroad selection for the same land is *in effect a rejection of the proffered selection, and cancellation of entry does not operate to revive the application to select,* although never formally rejected, to the prejudice of the rights of an adverse claimant."
>
> (*The italics are ours.*)

The case of Swanson vs. N. P. Ry. Co., 37 L. D., 74, cited in the decision, is not in point for the reason that, in that case as stated, "the State made no attempt to exercise its preferred right of selection and there was therefore (for that reason) no bar to the consideration of other claimants the same as though such a right had never existed." But even if it be conceded this ruling would be right if applied to contest cases, it has no application to the case at bar, where a regular selection was made and accepted by the Land Department, and remained of record *until 1915, and was not then cancelled because of any right of the railway company under its selection.*

But, neither the decision in the case of Stewart vs. Peterson, *supra,* nor the circular issued thereunder apply to the case at bar. That decision and all those considered therein as well as the case of Cowles vs. Huff, which it modifies, and all the cases which we have found to which

it has been applied are *contest* cases. Upon its face it applies only to this class of cases and as that statute is a special one, the decision and the circular are not applicable in any other classes of cases. The Department protected the railway company against the amendment of the Forest Lieu Act of 1897, and its final repeal, upon the ground that the Act of 1899 is a special act and was not affected thereby. If that is sound law, then we insist that decisions and circulars applicable on their face to a special statute, in derogation of the general land laws should not be applied to another and different special statute, so as to *defeat a settler* under the *general homestead law*. The effect of its application in this case is to keep alive for fourteen years a proffered selection, which, because of *the special agreement between the Agricultural and Interior Departments* causes no inconvenience to the railway company but acts only to the detriment and irreparable loss of the homestead claimant.

Let us take another view of the force and effect of the departmental decision. The Department has held that both as to the application of the State for survey under the Act of 1894 and the original selection of unsurveyed land by the railway company under the Act of March 2, 1899, they acquire only a preference right and each is required to file within a limited time after the filing of plats of survey in the local office, the State a selection and the railway company a new list. The effect of this is to have two parties having a preference right at the same time for the same land. The decision also holds

that although the State exercised its preference right by making selection, the railway company instead of contesting the selection was permitted to have it held in abeyance until a settler made a twelve-year fight against the State selection, and after having won and secured its cancellation, the railway company is given a prior right to the land because of its *preference right which could not possibly have been exercised because of the State's selection.* The further effect is that the final proof made by Delany is 1909 shows his improvements were from $1,000 to $2,500, and as he has been residing upon, improving and cultivating the land ever since, it is but reasonable to suppose they are now worth from $2,500 to $3,000, all of which together with his twelve years of labor and residence is to be forfeited to the railway company which has never expended a dollar and has no equities whatever. Thanks to the agreement between the Interior Department and the Agricultural Department the railway company is not required to furnish a base, tract for tract, as the railroad companies have been required to do in the adjustment of their grants since the administration of Secretary Lamar in 1885 and the several States are also required to do, but merely refer to it as a part of the 440,000 acres conveyed to the United States under the act.

Can this be the law? If it is, it is not based on justice, equity, nor common right and should not be used to forfeit the claim of the settler with all of his improvements and his earning the land more than twice over under the

five-year homestead law and four times under the three-year law.

The Description of the Land in the Railway Selection.

However much we may disagree with the Department, we assume we must take the decision in the Daniels case, based as it was on the oral hearing in the case of Miles *et al.*, as accurately expressing the views of the Department as to a description of unsurveyed lands by the railway company under the Act of March 2, 1899. This is especially true in this case, as that decision is referred to as authority for the ruling made. Let us, therefore, analyze that decision and see just what it does hold as to the sufficiency or insufficiency of a description in the terms of a future survey, for, if the description given in this case when considered in connection with the lack of established surveys in the "immediate vicinity," or even in the "vicinity," as they are defined in the dictionaries, together with the conditions prevailing, viz., in a mountainous heavily timbered rough region of country, it certainly would not be held to protect the company against the rights of a settler who went upon the land without any notice of the claim of the company, not only before the filing of the plats of survey, or their approval by the Commissioner, but before the survey was made in the field, and of necessity therefore before the new list was filed by the company, is *not sufficient* under the rule supposed to be established in the Daniels case, or that of

Judge Dietrich, affirmed by the Circuit Court of Appeals in the West case, and can be no protection against the claim of Delany.

The decision in the Daniels case states:

> "While the metes and bounds description of selected unsurveyed land should always have been, as it now is, required."

In the case of Thorpe *et al.* vs. The State of Idaho, 42 L. D., 15, decided March 22, 1913, the Department held, after reviewing the two decisions of the Supreme Court of that State, as to the right of the State Land Board to make the selections, and the confirmatory act of 1911 held:

> "*This Department has never had any doubt as to the validity of these selections.* * * * This difficulty has now been removed and it is not material whether the court changed its minds upon the question or whether the invalidity suggested by the court in the first instance has been cured by legislation. In either case no good reason remains why said Department decisions should not be carried into effect. *They are therefore hereby reaffirmed and the necessary steps will be taken to carry them into effect.*"

If not when the State exercised her preference right, surely when this decision was rendered, the Railway Company's selection should have been cancelled but was not.

Again, when the case of F. A. Hyde, 40 L. D., 284, was

decided October 6, 1911, holding that even in a Forest Lieu Selection which is entitled to a liberal construction and does not require description of unsurveyed lands "with reasonable certainty," a description in terms of future survey was insufficient and no protection against settlers. Here again it was the duty of the Land Department to cancel and reject this pending application and selection of the Railway Company, but it was not done.

Under this decision which remained the law of the Department from October 6, 1911, to March 10, 1914, more than two years and a half, all of the selections by the Railway Company under this act should have been cancelled, but they remained until it suited the pleasure of the Railway Company to ask for and obtain an oral hearing which resulted in the reversal of the Hyde case.

This court, in the case of Cropley vs. Cooper, 19 Wall., 174, laid down this general rule:

> "Equity regards substance and not form, and considers that as done which is required to be done." See also Craig vs. Leslie, 3 Wheat., 518.

We have seen all the equities are with the appellee. Delany had braved the hardships and privation of years of residence and expended about $2,500 to $3,000 in clearing, cultivating and otherwise improving the land, as well as the expense of years of litigation.

The Railway Company did not expend a cent unless it was in litigation, and consequently to deprive it of the land would be no loss, as the purchase money (scrip)

used would be returned to it, and the increase in value would be much greater than the interest on its value at the date of filing to the present time. It has no equities.

Respectfully submitted,

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